ADMINISTRATIVE LAW BULLETIN

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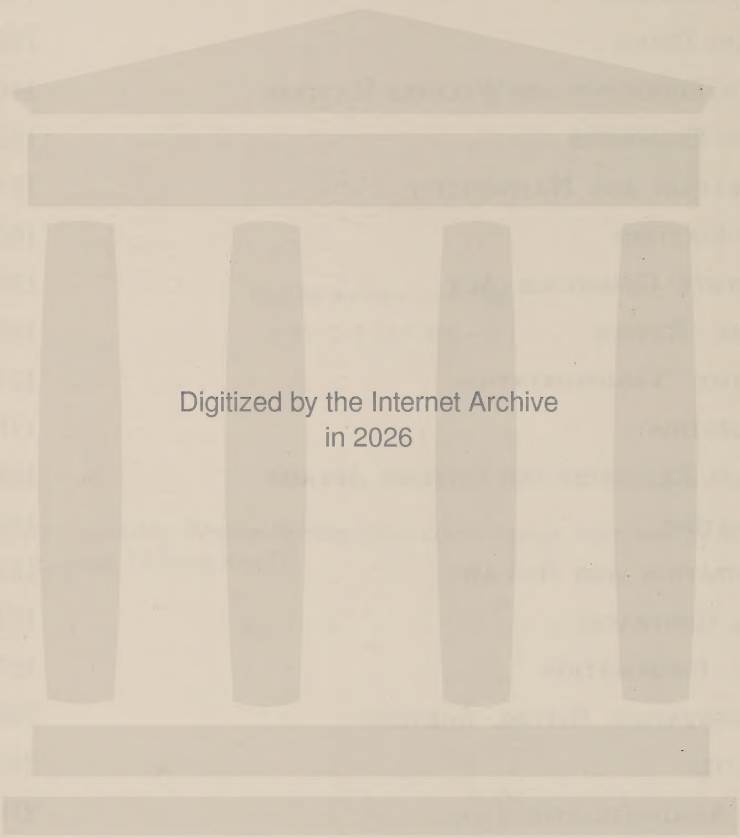

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CHAIRMAN'S PAGE

This concluding edition of Vol. 10, Ad. Law Bulletin as usual contains Committee Reports which will be considered at the Section's Annual Meeting. Committee Chairmen and Section members are invited and encouraged to communicate views on these Committee Reports to Arnold Levy, Chairman of the National Committee.

Nominations. The procedure set forth in the newly adopted By-Laws for the nomination of Officers and Council Members has been followed by publishing the report of the Nominating Committee.

S. 4094. Of general interest to the Section members is the fact that S. 4094, the ABA sponsored new Code of Federal Administrative Procedure, was introduced on July 1, 1958 by Senator Ervin and Senator Butler.

Committee Membership. Each Section member who is interested in being on and contributing to the work of a Section Committee is urged to complete and mail the enclosed committee placement card.

The Winter-Spring Issue of the Ad. Law Bulletin was not continuously paged which presents a citation problem for which there is no practical correction. We suggest a conversion factor of adding 60 to each numbered page of the Winter-Spring Issue; or, of adding in the citation the words "Winter-Spring Issue."

DONALD C. BEELAR, *Chairman*

PROGRAM OF ANNUAL MEETING

LOS ANGELES, CALIFORNIA

AUGUST 23RD THROUGH 26TH, 1958

AMBASSADOR HOTEL

Saturday, August 23rd

12:30 P.M.—Luncheon Meeting—Council and Committee Chairmen (Regency Room)

2:00 P.M.—Meeting of Council and Committee Chairmen (Colonial Room)

Sunday, August 24th

10:00 A.M.—Meeting of Council and Committee Chairmen (Colonial Room)

Monday, August 25th

(Colonial Room)

2:00 P.M.—"Deficiencies and Fairness of Government Contract Procedures and Appeals," Moderator—Robert Watts, Vice President and General Counsel, Convair, San Diego

Panel Members:

Bernard J. Gallagher, Washington, D. C., Chairman Public Contracts Committee

Louis Spector, Member Corps of Engineers Claims and Appeals Board

Frederick Sass, Jr., Counsel for the Bureau of Aeronautics, Department of the Navy

3:15 P.M.—"Influence in Federal Agency Law-Making and Adjudicatory Proceedings—Should we adopt a Code of Agency Ethics." Moderator—Donald C. Beelar, Washington, D. C.

Panel Members:

Congressman Clair Engle, Second Congressional District of California

Judge David W. Peck, New York City

Professor Leo A. Huard, Georgetown Law School, Washington, D. C.

Guy Farmer, Washington, D. C.

Albert E. Stephan, Seattle, Washington

5:35 P.M.—Reception (To be announced)

Tuesday, August 26th

10:00 A.M.—Section Meeting—Committee Reports (Colonial Room)
12:00 P.M.—Luncheon Recess
2:00 P.M.—Section Meeting—Committee Reports (Colonial Room)
4:00 P.M.—Election of Officers and Council Members
6:00 P.M.—New Council Organization Meeting (To be announced)

REPORT OF THE COMMITTEE ON AGENCY RULE MAKING

The Committee on Agency Rule Making is new this year. The time its chairman could devote to the Committee's work has been too limited to permit carrying that work beyond the stage of preliminary planning. The Committee's recommendation is, therefore, that the Committee be continued, and that the 1958-59 Committee give consideration to the suggestions that follow, which result from the Committee's thought thus far.

Correspondence among the chairman and vice-chairmen of the Committee has developed agreement that the Committee's functions should be twofold: (1) to suggest improvements in agency rule-making processes within the framework of existing statutes, and (2) to propose such legislation as may be desirable for the improvement of these processes. In connection with its second function the Committee should consider, in the light of its further studies, whether section 1003 of the proposed Code of Federal Administrative Procedure can be improved as an over-all reform measure.

The principal body of contemporary data relating to the processes of Federal administrative agencies is in the responses of the agencies to the 1956 questionnaire of the House Committee on Government operations. Part I of the questionnaire dealt with rule-making. The Committee should, we believe, proceed by examining the responses to this Part with relation to such items as may be thought by the Committee to involve procedural problems of especial significance at this time. To the extent that information concerning these problems appears to be lacking, the Committee might proceed to make first-hand inquiries of its own.

In the judgment of the Committee, questions 6, 8, and 9 of Part I of the questionnaire addressed to the agencies bear most closely on the problems that should receive Committee attention as soon as feasible. Involving, as they do, the extent and manner of submissions by outside interests to the agencies in connection with rule-making in situations where the requirements of the Administrative Procedure Act are minimal or are lacking entirely, these questions have elicited information which may point in the direction of future progress.

RALPH F. FUCHS, *Chairman*

REPORT OF COMMUNICATIONS COMMITTEE

Preface

The Communications Committee of the Administrative Law Section undertook this year to consider and report on the following subjects:

1. The adoption of a Code of Ethics by or for the Federal Communications Commission.
2. The procedure governing the filing and consideration of counter-proposals in response to rule making proposals of the Federal Communications Commission.
3. Amendment or elimination of Section 309(c) of the Communications Act of 1934, as amended, providing for protests against grants without hearing by the Federal Communications Commission of applications for radio station authorizations.
4. Judicial stay of decisions of the Federal Communications Commission in comparative broadcast cases upon appeal to the United States Court of Appeals for the District of Columbia Circuit.
5. The roles of the Air-space Subcommitee of the Air Coordinating Committee and the Federal Communications Commission in deciding whether towers proposed for radio stations constitute hazards to air navigation.

In the report, *infra,* on each subject, there are presented a statement of the problem, discussion, and the recommendations of the Committee.

I

The adoption of a Code of Ethics by or for the Federal Communications Commission.

Statement of the Problem. The recent activities of the Subcommittee on Legislative Oversight of the House Interstate and Foreign Commerce Committee have stimulated interest in the subject of a Code of Ethics for members and employees of the various federal regulatory agencies. Individual legislators, the agencies themselves, and bar associations have raised the questions of (1) whether codes of ethics or conduct should be established; (2) if so, who should establish them; and (3) what the substance of the standards should be.

Discussion. A number of bills have been introduced in both the House of Representatives and the Senate dealing with this subject. Some of these bills, like H.R. 10631, introduced by Congressman Pelly on February 10, 1958 and H.R. 11022 and 11249, introduced by Congressmen Wolverton and Cramer on February 26, 1958, would set up a comprehensive set of standards of conduct for all federal administrative agencies. Other bills, like H.R. 11886 introduced by Congressman Harris on April 14, 1958, and H.R. 11893, introduced by Congressman Reuss on April 14, 1958, would affect only the Federal Communications Commission, by amending the Communications Act of 1934.

The subject of the adoption of new or additional regulations governing the conduct of agency employees has also received attention in recent months from the agencies themselves. Several months ago the Securities and Exchange Commission announced that it had prepared proposed Canons of Ethics for members of the Commission to supplement its regulations regarding conduct of members and employees and former members and employees, most of which had been in effect for many years. It is understood that the Chairman of the SEC sent copies of the proposed new canons to the other federal regulatory agencies for their information and suggestions. The Office of Administrative Procedure in the Department of Justice also has the subject under study.

The adoption of a Code of Ethics for its members and employees is also under study by the Federal Communications Commission. The Commission's staff has requested and has received from the Federal Communications Bar Association certain material in the files of the Association dealing with this subject. The question of proposing the adoption of a Code of Ethics by the FCC was considered several years ago by the Federal Communications Bar Association. In the latter part of 1955, a special committee of the FCBA was appointed to prepare a draft of such a Code. A draft was prepared and submitted to the Executive Committee of the FCBA. At that time the FCBA had under active consideration the revision of its Canons before going forward with any suggested Canons for the FCC.

Recently the Committee on Ethics and Grievances of the FCBA gave the subject further consideration, and expressed the following view:

> "Regarding a Code of Ethics for the FCC, the Committee was of the opinion that the initiative regarding the adoption of a Code

should be taken by the FCC. If the FCC desires to adopt a Code, the FCBA should cooperate fully upon request of the Commission."

At the 1958 Midyear Meeting of the House of Delegates of the American Bar Association at Atlanta, Georgia, on February 24-25, 1958, the Chairman of the Section of Administrative Law, Mr. Donald C. Beelar, of Washington, D. C., proposed a resolution which would put the Association on record as favoring the adoption of legislation by Congress providing for a code of agency-tribunal ethics, comparable to the Canons of Judicial Ethics. The House of Delegates voted to adopt the resolution, which, as amended from the floor, read as follows:

"WHEREAS, The American Bar Association has repeatedly urged that the organization and procedure of federal administrative agencies in the exercise of adjudicatory powers provide (1) that hearing officers be assured independence of judgment and impartiality in the trial of agency cases, (2) that the integrity of the judicial process at all levels in the agency be protected by confining decisions to the public hearing-record in an environment totally free from any ex parte off-the-record representations, influences or pressures from any source,

"*Now, Therefore,* This Association records its opinion that more effective agency and congressional action to those ends would improve and inspire greater public confidence in agency adjudicatory determinations, and believes it desirable that an appropriate code of agency-tribunal *standards of conduct* comparable to the Canons of Judicial Ethics be established by statute binding upon all persons engaged, interested, participating in, or seeking to affect the result of the adjudication of agency-tribunal cases." (44 ABAJ 383, May 1958.)

Recommendations. 1. That the Committees of Congress which are considering legislation to establish agency-tribunal standards of conduct be advised of the position of the ABA on this subject, as expressed in the resolution adopted at the 1958 Midyear Meeting referred to above.

2. That request be made for an opportunity to testify on such proposed legislation, if hearings are held.

3. That, until such time as legislation on the subject, is adopted, the Section on Administrative Law should cooperate, upon request of any agency which desires to adopt new or additional regulations dealing with standards of conduct for agency personnel. If

such cooperation is requested by the Federal Communications Commission, this Committee would work with the Commission's personnel in the preparation of a draft of a Code of Ethics for the Commission.

II

The procedure governing the filing and consideration of counter-proposals in response to rule making proposals of the Federal Communications Commission.

Statement of the problem. With stated exceptions, Section 4 of the Administrative Procedure Act requires agencies to publish general notices of proposed rule making in the Federal Register containing, among other things, the terms or substance of the proposed rule or a description of the subjects and issues involved. The Federal Communications Commission, while publishing notices of proposed rule making in the Federal Register and describing the substance of proposed rules, has followed the practice of receiving and considering counter-proposals contained in comments filed in answer to notices of proposed rule making, even though the counter-proposals suggested entirely new solutions to the problems involved in the proceedings. Such counter-proposals are not published in the Federal Register, nor is there any Commission requirement that they be served on other parties interested in the proceedings. The question arises, therefore, whether Commission consideration of counter-proposals not within the ambit of the original notices of proposed rule making is contrary to the letter and spirit of Section 4 of the APA.

Discussion. The Attorney General's Manual on the Administrative Procedure Act (1947) states the purpose of Section 4 as follows:

> "In general, the purpose of Section 4 is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substitute rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it." (p. 26)

Since notice to the public is the paramount concern of Section 4 of the APA, it is necessary to examine the practice of the Commission with respect to giving notice of counter-proposals in rule making proceedings to determine the validity of the consideration regularly given to such counter-proposals.

Persons desiring the Commission to adopt new rules, or to amend existing ones, file petitions for rule making setting forth the nature of the proposed rules or amendments and the reasons why they should be adopted. There is no requirement that the petitions be served on anyone. However, public notice of the filing of such petitions is announced by the Commission in a press release, and diligent parties this way learn of such petitions and have an opportunity to oppose or support them if they so desire. Any statements supporting or opposing petitions to institute rule making proceedings must be served on the petitioners. (Rule 1.204.) If the Commission is convinced that there is sufficient substance to the petitions, it issues formal notices of proposed rule making which are published in the Federal Register. Time limitations are set for the filing of written comments and reply comments. The average time for filing comments and reply comments is 30 days and 15 days respectively. There is no Commission requirement that comments or reply comments be served on interested parties since it is difficult to ascertain all of the parties who might have an interest in the rule making proceedings.

Parties opposed to the adoption of proposed rules often go further than merely explaining why they should not be adopted. They frequently offer variant solutions to the underlying problems which bring in new issues not within the ambit of the original notices of proposed rule making. For example, the Commission recently issued a notice of proposed rule making raising the question whether television channel 3 should be alocated to Ainsworth, Nebraska. (Television channels are allocated geographically by rule making.) An existing station on channel 3 at Omaha, Nebraska opposed the suggested allocation, and also petitioned the Commission to issue a supplemental notice of proposed rule making to allocate channel 7 to Ainsworth rather than channel 3. By order released November 6, 1956 (21 F.R. 8821), the Commission held squarely that the counter-proposal to allocate channel 7 rather than channel 3 to Ainsworth need not be the subject of further public notice by amendment of the notice of proposed rule making, but that the merits of the counter-proposal would receive full consideration in the proceeding. A channel 7 station in Omaha, which had no interest in the rule making proceeding affecting channel 3 but had a definite interest in the issue presented by the counter-proposal with respect to channel 7, did not receive service of the counter-proposal, was not notified of the

counter-proposal by the Commission directly through press release or otherwise, and did not have constructive notice through amendment of the original notice of proposed rule making to encompass the enlarged issue. (Fortuitously, the channel 7 station at Omaha had actual notice. See Report and Order, Docket 11830, 15 *Pike & Fischer, Radio Regulation,* 1617, 1620.)

In the Evansville deintermixture case (Docket No. 11,757, 15 *Pike & Fischer, RR* 1573), the Commission issued a notice of proposed rule making which was published in the Federal Register suggesting that Channel 7 at Evansville be changed from a commercial to a noncommercial educational channel. Comments were filed pro and con the suggested amendment. Some of the comments proposed that in lieu of changing Channel 7 to a noncommercial status, the channel should be reallocated to Louisville, Kentucky. Other comments recommended that complete deintermixture in the Evansville area be effectuated by deleting Channel 9 from nearby Hatfield, Indiana, and reserving the channel for educational use at Evansville. Neither of these counter-proposals was ever published in the Federal Register. However, the proposals involved had been the subject of previous rule making proceedings. The Commission adopted both counter-proposals. The question whether such action complies with Section 4 of the Administrative Procedure Act is now pending on appeal in the United States Court of Appeals for the District of Columbia Circuit (*Owensboro on the Air, Inc., et al.* v. *United States of America, et al.,* Nos. 13,776, *et al.*).

In view of the fact that Section 4 of the APA strives to insure public notice of the substance of administrative rule making (with the exceptions listed in the Act), it seems clear to this Committee that the general purpose and meaning of Section 4 is vitiated by the failure of the Commission to provide notice of counter-proposals by means of publication in the Federal Register or other procedures sanctioned by Section 4. The Committee is aware of the practical difficulties in this matter pointed out by the Commission in its Report and Order in the Ainsworth, Nebraska proceeding, referred to above:

> "Rule making proceedings could go on interminably if an administrative agency such as this Commission should be required, wherever a meritorious counter-proposal is advanced in comments, to issue a Further Notice of Proposed Rule Making and to

extend the time for filing comments for a reasonable period after issuance of the further notice." (15 *Pike & Fischer, RR* 1620.)

However, the possibility of interminable protraction of rule making proceedings is not in itself justification for not abiding by the requirements of the Administrative Procedure Act rather than providing a procedural technique which would both permit compliance with the APA and serve administrative convenience. It also appears that there is substantial basis for thinking that the acute problem confronting the Commission in the allocation of television channels by rule making, rather than upon applications therefor, is not typical of the administrative rule making process.

Recommendation. The Committee has given consideration to techniques of notice which would both satisfy the notice requirements of Section 4 of the APA but avoid excessive delay in rule making proceedings of the Federal Communications Commission, especially with regard to television channel allocation rule making, but has not agreed upon any one of several alternatives suggested. It is recommended that the effort to reach agreement on a notice procedure consistent with Section 4 of the APA and with administrative convenience be continued by the new Committee.

III

Amendment or elimination of Section 309(c) of the Communications Act of 1934, as amended, providing for protests against grants without hearing by the Federal Communications Commission of applications for radio station authorizations.

Statement of the Problem. There are pending in Congress (in Committee) bills to amend the Communications Act of 1934, as amended, by repealing Section 309(c). (H.R. 4816, S. 1577, introduced in 1st Sess., 85th Cong.) This is the Section of the Act which permits "any party in interest" to file a protest against grants by the Commission without hearing of applications for radio station construction permits, or "any instrument of authorization," granted under Section 309(a), and to have a hearing on the protest if certain threshold conditions are met. The Commission has supported the repeal of Section 309(c) on the ground that Section 405 of the Act (providing for petitions for "rehearing") provides a superior remedy against grants not in the public interest; and that a great deal of time is wasted in hearing baseless protests.

The question before the Committee is whether the public interest would be served by the repeal of Section 309(c) of the Act.

Discussion. Section 309(c) was adopted in 1952 to provide for protests. (66 Stat. 715, 47 U.S.C. Sec. 309(c).) Congress' purpose in thus amending the Communications Act of 1934 was to afford interested parties the right to a hearing before the Commission on public interest factors which allegedly showed that a grant without hearing of a radio station authorization was actually not in the public interest. In its original form, Section 309(c) required parties in interest to allege with particularity the facts, matters and things relied upon, and required the Commission—if the protest complied with the procedural requirements of the Section—to stay the grant pending hearing and decision, except in cases where the protested authorization was necessary to the conduct and maintenance of an existing service.

Initially, the Commission attempted to restrict the definition of the term "party in interest." This approach was overturned by certain decisions of the United States Court of Appeals for the District of Columbia Circuit which placed a broad interpretation on that term and which permitted persons not engaged in broadcasting to protest the grant of a new facility in a community. (See, e.g., *Camden Radio Inc.* v. *Federal Communications Commission,* 94 U.S. App. D.C. 312, 220 F. 2d 191; *Metropolitan Television Co.* v. *Federal Communications Commission,* 95 U.S. App. D.C. 326, 221 F. 2d 879; *Clarksburg Publishing Company* v. *Federal Communications Commission,* 96 U.S. App. D.C. 211, 225 F. 2d 511.)

Subsequently, having been overruled on the standing question, the Commission construed strictly the statutory requirement that the allegations of facts, matters and things relied upon by the protestant to impeach the grant had to be made with "particularity," rather than in general terms. This interpretation, in turn, was reversed. The Court, in effect, required the Commission to designate the protests for hearing even though the facts therein were insufficient, *per se,* to invalidate the grant, on the ground that if those facts were further inquired into, such inquiry might tend to establish that the grant was not in the public interest. (*Federal Broadcasting System* v. *Federal Communications Commission,* 96 U.S. App. D.C. 260, 225 F. 2d 560.)

In practical operation, the situation resulted in the filing of a large number of protests. The Commission became "plagued with

the so-called 'economic injury protests,' namely, protests filed by existing stations claiming that their particular market could not support a new station and that this financial inability of the market to support the newcomer was itself a reason for denying the grant." (See Fisher, *Communications Act Amendments of 1952—An Attempt To Legislate Administrative Fairness, Law and Contemporary Problems,* Duke University School of Law, (Autumn 1957), citing *American Southern Broadcasters,* 11 Pike & Fischer 1054, *Radio Tifton (WTIF),* 11 Pike & Fischer 1167 and others.) The agency was of the opinion that the protest procedure, in its original form, was being seriously abused by persons using the mandatory hearing and stay features of Section 309(c) solely for the purpose of private gain by holding off, for as long as possible, the addition of new, competing facilities. As a consequence of these alleged abuses, the resulting backlog of protested authorizations became so great and the additional administrative burden thus imposed on the Commission in hearing these protest cases so onerous, that the agency sought relief from Congress. (See 1 Pike & Fischer § 10:1100 (1955).)

H.R. 4614, 84th Cong., 1st Sess., was introduced for the purpose of amending Section 309(c). Hearings were held on H.R. 4614 on June 22 and 24, 1955, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, at which members of the Commission expressed their views on the need for amendment of Section 309(c), and at which various other witnesses testified as to the abuses to which they considered that section was being put. As shown by House Report No. 1051, July 1, 1955 and Senate Report No. 1231, July 28, 1955, which accompanied H.R. 4614, Congress fully agreed to the need for revising Section 309(c).

The ensuing amendment of Section 309(c) by enactment of Public Law No. 391, 84th Cong., 2nd Sess., 70 Stat. 304, effected three principal changes in the former protest procedure: (a) it permitted the Commission to treat as on demurrer facts which, even though proven true, constituted no ground for setting aside the grant; (b) it made the grant of a stay of the protested authorization discretionary where the Commission affirmatively found and set forth in the decision its reasons as to why the public interest required the protested grant to remain in effect; and (c) it gave the Commission authority to redraft issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest.

Although this amendment has solved some of the problems in protest cases, other problems still remain. As stated by Fisher (Note 1 *supra,* pp. 690-691, footnotes omitted):

> "In some cases, the new law has been a great improvement. It has been helpful in those cases where an oral argument suffices to develop all relevant matters. The Commission commonly now uses this quick hearing rather than the full evidentiary hearing. The new section has also been helpful in many cases of initial licensing. Under the old provision, a competitor could invoke the mandatory stay provision so as to delay new competition, the only exception being where the grant was necessary to the maintenance of an existing service. This, however, was a rare situation.
>
> "Now the Commission has the power to permit the grant being protested to remain in effect if it finds affirmatively that the public interest requires it. For example, in Coos County Broadcasters, the Commission refused to stay the grant of a third station in the market, though granting the protest. It refused a stay, because the grantee proposed to operate the first independent station in the market, and also because a study of the allegations in the protest indicated that there was little likelihood that the protestants would prevail on the merits of their protest. Without their stay, the protestants immediately dismissed their protest, since they could no longer delay the new service; the grantee got on with the business of providing a needed service to this community at a much earlier date than would have been possible under the old act. In other words, where a new authorization is involved and where it will bring a needed service to the community, there is a good possibility that the stay will not issue. If it cannot obtain a stay, the existing station is less likely to continue the protest hearing. In any event at least the Commission now has some discretion.
>
> "The major problem remaining in so far as stays are concerned, is whether transfer and assignment grants will be stayed upon protest. Certainly, it will prove difficult to avoid the stay upon the grant of a protest. After all, the transferor or assignor has been operating the station; except upon a most unusual showing, it can presumably continue to operate. Therefore, it is difficult for the Commission to find a compelling reason why the public needs the service from the transferee as opposed to service from the transferor. In some cases, it has been done; but in most cases the stay has issued. Thus, in the typical assignment or transfer case, the new section 309 (c) has not been much help in preventing the filing of meritless protests.
>
> "The Commission continues to have trouble in finding clear

and simple tests to apply to protest proceedings. The constant changes in Commission position and the frequent resort to the courts certainly does not lead to expeditious and effective administration. Therefore, it is believed that further amendments to section 309(c) are in order."

As indicated above, the Commission has spent a considerable amount of time in dealing with those protests. Further, in the vast majority of cases, after hearing the Commission reinstates the grant. There are only a handful of cases in which the Commission has set aside the grant after the protestant has had "his day in court."

The Commission itself does not like the protest provisions of Section 309(c). Thus, the present Chairman of the Commission said in an address before the Broadcasting Advertising Club in Chicago, on October 29, 1956:

> ". . . the Federal Communications Commission is enmeshed in more due process and procedural difficulties than any other federal agency. I seriously doubt whether there is any other agency or court in the land that has a more intricate and dilatory procedural set of laws. In my opinion, the 1952 legislation peculiar to the FCC has vastly over-emphasized the rights of private applicants over the needs of the public. Today, at least 30 percent of the time of our Examiners and of our Office of Opinions and Review, and at least 30 percent of the time of the Commissioners is spent in deciding protest cases. These, under the law, must be expedited. In most of them, the protestant has no other objective than to delay the implementation of a broadcast service. These people love freedom of competition a good deal less than they love freedom from competition. Nonetheless, a thorough study of these hobbling procedural laws will convince fair-minded persons that much of the delay in the FCC is not the fault of the Commission."

On the other hand, there are those who believe that Section 309(c) should not be repealed because it is an assured means of bringing to the Commission's attention matters which may make a grant against the public interest. Stated another way, this provision requires the Commission to act fairly and promptly upon legitimate complaints. If the protestant has standing and brings serious matters to the Commission's attention, the Commission must act and act quickly. In the case of a new grant, and absent an affirmative finding of need, in terms of the public interest, the

Commission must stay th ;ant. These advantages would be lack-
ing if Section 309(c) sho l be repealed. Many practitioners be-
fore the Commission re mber when, prior to the adoption of
Section 309(c) in 1952, titions for reconsideration or "rehear-
ing" under Section 405 r ained on file without action for as long
as 18 months. Doubts hav also been expressed as to whether the
Commission's unfavorable attitude toward the entire idea of pro-
test proceedings has interf red with the establishment of expedi-
tious procedures intended by Section 309(c).

There is a third view, also. The opinion has been expressed that the Section should be modified only insofar as the stay provision is concerned. The S ction now allows the Commission to permit the utilization of a f cility or authorization under a grant issued without a hearing an l duly protested (even though it does not involve an existing serv ice) if the Commission affirmatively states in its decision that the public interest requires the grant to remain in effect pending dec sion after hearing. It has been proposed that the criteria for de ermining whether a stay should be granted should be the traditi nal tests—probability of prevailing on the merits of the protest, and irreparable injury to the protestant.

Recommendation. Although a majority of the Committee is of the opinion that Section 309(c) and its possible modification or elimination is an extremely important question, it is the consensus of the Committee that the subject requires further study by the Committee. Consequently, the Committee has adopted no recommendation for action.

IV

Judicial stay of decisions of the Federal Communications Commission in comparative broadcast cases upon appeal to the U.S. Court of Appeals for the District of Columbia Circuit.

Statement of the problem. Two or more mutually exclusive applications for broadcast facilities are regularly accorded a comparative hearing by the Federal Communications Commission to determine which applicant would better serve the public interest and, therefore, which application should be granted. (See Section 309(b) of the Communications Act of 1934, as amended; *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U.S. 327; and Rules 1.361 and 1.362.) There is a wide-

spread, perhaps unanimous, opinion among the members of the Bar of the Commission that substantial construction and investment of funds by the winning applicant invariably impels the Commission sympathetically to stand by the original winning applicant against all attacks by the losing applicants via petitions for reconsideration (under Section 405 of the Act) or judicial review (under Section 402(b) of the Act). While the Bar's belief in the efficacy of quick construction by a winning applicant is largely based upon informal judgments and observation of subjective reactions of individual administrators, there has been at least one objective revelation of the general principle.

In a Memorandum Opinion and Order released September 18, 1952, the Commission designated for comparative hearing applications of Peoples Broadcasting Company and WGAL, Inc. for television Channel 8 at Lancaster, Pennsylvania, and also concluded that WGAL, Inc. should be permitted to operate on Channel 8 pending the outcome of the comparative hearing. (WGAL, Inc. had been operating on Channel 4 at Lancaster.) At paragraph 29 of the opinion, the Commission stated:

> "We recognize that permitting the existing station to incur substantial additional expense involved in the construction of a television station operating with full power as proposed by WGAL, Inc. in its application for a construction permit could result in an advantage to WGAL, Inc. in a comparative consideration of its application with the competing application of Peoples. Accordingly, it is our view that the authorization to WGAL-TV on Channel 8 should be with the minimum power provided for in our rules." (8 *Pike & Fischer, RR* 275, 285.)

When a losing applicant in a comparative hearing for the Commission takes an appeal to the U.S. Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act, he may win a reversal of the Commission's comparative determination because of legal error. However, when the case is remanded to the Commission for further consideration, the original winning applicant has already constructed its station and invested substantial funds. For the reasons stated above, and in spite of the assurances which have been given to the Court of Appeals by the Commission that effect would not be given to expenditure of funds (see *Peoples Broadcasting Co.* v. *U.S. et al.,* 209 F. 2d. 286, 288), it can regularly be expected that the Com-

mission will redecide the case in favor of the winning applicant after remedying the error found by the Court.

This scheme of things has led to petitions by the appellant to the Court for stay of the Commission's comparative decision *pendente lite* in order to avoid the adverse effect upon appellant's case of construction by the original winning applicant if the Court should remand the case to the Commission. However, such petitions for stays have uniformly been denied in comparative cases by the Court of Appeals. The denial of such petitions has been by way of one-page orders (unpublished) which have not in themselves revealed the reasoning of the Court. It is clear, however, from the questions of the Court in such cases that the Court expressly considers such petitions in the light of two criteria: (1) the merits, or the probability of prevailing upon appeal; and (2) the element of irreparable injury to the appellant-petitioner. The Court has accepted the assurances of the Commission's counsel that the Commission's further consideration of the comparative case (if remanded) would be unaffected by appellee's construction and investment *pendente lite* (see *Peoples Broadcasting Co.* v. *U.S. et al., loc. cit. supra*), and has refused, therefore, to find that such construction by the appellee would constitute irreparable injury to the appellant, if successful on appeal. Because there is no other irreparable injury to the appellant, the appellant has been unable to secure a stay of the Commission's decision.

The problem considered by the Committee, therefore, is whether action should be recommended to eliminate the compelling adverse effect upon an appellant in the ultimate decision of comparative cases by the Commission after remand by the Court which results from the construction of facilities and investment of funds by the applicant originally selected by the Commission.

Discussion. The members of the Committee have expressed general agreement as to the adverse effect on a successful appellant in comparative broadcast cases of the fact that the Commission's original choice of applicants has constructed the facilities in issue during the judicial review process. A recommendation was proposed that Section 402 of the Communications Act be amended to provide that judicial stays should be granted in comparative cases appealed to the Court of Appeals upon a showing of probability of prevailing on appeal—eliminating the requirement of showing irreparable injury—or the amendment of the Section by some other

technique to accomplish the same purpose, *e.g.*, a declaration of a presumption of irreparable injury to the appellant-petitioner.

Some of the members of the Committee had serious doubts about the recommendation suggested. These doubts stem from two considerations: (1) the belief that the public interest may be adversely affected by a judicial stay of comparative decisions because construction of new stations and new broadcast services to the public would be substantially delayed; and (2) the expressed opinion that, while Courts talk in terms of irreparable injury in cases involving stays of administrative action, Courts (realistically) grant stays because of over-all equities in cases rather than because of dispassionate regard for the principle of irreparable injury to the appellant-petitioners.

The proposed recommendation was supported by some members of the Committee on the ground that the judicial review provisions of Section 402 of the Act were vitiated in comparative cases by construction of the broadcast facilities in issue by the original winner before the Commission, and that there is a greater public interest in securing proper decisions from the Commission than there is in the rapid furnishing of new broadcast services. It was also suggested that concern with speed in furnishing new broadcast services to the public was not justified under the scheme of the Communications Act, which makes the furnishing of broadcast services completely dependent upon the decision of private individuals to provide broadcast service by applying for broadcast facilities. In many cases potential broadcast facilities have been unused for many years before applicants have decided to file applications therefor.

Recommendation. The inability of the members of the Committee to agree upon any remedy for the prejudicial effect upon a successful appellant of construction by the original winning applicant in a comparative case prevents a positive recommendation by the committee. However, the agreement of the Committee members that a case remanded to the Commission by the Court of Appeals, for legal error, is affected upon reconsideration by the Commission by the legally irrelevant fact that the original, winning party has constructed the facilities in issue merits further consideration by the Committee. It seems clear that the judicial review provisions of Section 402(b) of the Communications Act are being vitiated substantially in comparative cases for the reasons hereinabove stated. It follows that the Association should

make further effort to secure effective compliance with the intent of Section 402(b) of the Act to the end that the best applicant in comparative broadcast cases may be selected ultimately by the Commission.

V

The roles of the Air-space Subcommittee of the Air Coordinating Committee and the Federal Communications Commission in deciding whether towers proposed for radio stations constitute hazards to air navigation.

Statement of the Problem. Under the statutory standard of "public interest, convenience, and necessity" in Section 309(a) of the Communications Act, the Commission has the authority to deny an application for radio station license on the ground that the construction (of a tower) would constitute a hazard to air navigation. (*Simmons* v. *Federal Communications Commission* (1944) 145 F. 2d. 578.) Part 17 of the Commission's Regulations (Subpart B) prescribe the conditions under which applications will be referred to the Air-space Subcommittee of the Air Coordinating Committee (composed of various military and civilian representatives of aviation interests and of the Commission) for consideration and recommendation to the Commission as to whether a grant of an application would establish a hazard to air navigation. While there has not been a great deal of criticism of the Commission's ultimate disposition of cases involving the issue of potential hazards to air navigation, there has been sufficient criticism of the procedures of the Air-space Subcommittee of the Air Coordinating Committee to stimulate the interest of this Committee.

Discussion. The criticisms of the procedures of the Air-space Subcommittee have been directed mainly at such matters as notice to applicants and their counsel of the time and substance of consideration to be given to their radio station applications, the way in which meetings are conducted, and the non-aviation matters considered by the Air-space Subcommittee. Counsel have complained that they have been deprived of an opportunity to make pertinent presentations to the Subcommittee because they did not know when specific applications were going to be considered. They have objected that persons whom they considered strangers in interest to their applications have been heard by the Subcommittee. They have also complained that the Subcommittee has considered

elements of broadcasting service to the public, intensity of signal strength in various areas, and financial matters, in arriving at a favorable or unfavorable recommendation to the Commission on the subject of hazards to air navigation.

In April and May of 1958 the Association of Federal Communications Consulting Engineers and the Federal Communications Bar Association appointed a Joint Committee to explore the procedures of the Air-space Subcommittee of the Air Coordinating Committee and arrive at proposals which both associations might sponsor. It appears, therefore, that the two professional organizations most competent to deal with the problem under consideration have undertaken a commendable program which promises to produce a proper and realistic system for evaluating radio station applications in relation to air traffic safety.

The role of the Air-space Subcommittee is, of course, subordinate and advisory in relation to the role of the Commission as the authority on whether applications should be denied as proposing hazards to air navigation. As might be expected, however, the Air-space Subcommittee's recommendations are given great weight by the Commission. It is, therefore, of great importance that the soundness of the Air-space Subcommittee's recommendations be promoted by the use of the most appropriate and fair procedural techniques available. If dissatisfaction with the procedures of the Air-space Subcommittee is not met, it is quite possible that there will be considerable sentiment for changing the role of the Air-space Subcommittee from advisor to the Commission to that of witness in virtually all cases involving possible hazards to air navigation.

Recommendation. Under the circumstances related above, the Committee believes that it should keep in touch with the joint effort of the AFCCE and FCBA to solve the problems under consideration, and refrain at this time from undertaking a separate program for a solution of the problem.

ARTHUR W. SCHARFELD, *Chairman*

REPORT OF THE COMMITTEE ON FOOD AND DRUGS

As of late June, it appears that the Health and Science Committee of the House Committee on Interstate and Foreign Commerce is about to report a clean bill on control of food additives. The committee print has not been released for circulation, and therefore has not been considered by the Food and Drug Committee of the A L Section. Nevertheless, through the courtesy of Chairman John Bell Williams, opportunity was had for a brief inspection of the working draft. In view of the wide interest in this bill there follows a brief description of the major points as they stand at this time.

Generally speaking the bill follows the frame-work of H.R. 6747 (F.D.A. bill). This represents defeat of the various efforts to provide (through injunction, declaratory judgment, etc.) for a *de novo* judicial review of the facts.

The mechanisms relied on to counter-balance the administrative power inherent in the licensing approach, are the scientific advisory committee and a new formula for both the administrative decision and the appellate review.

The Section relating to the scientific advisory committee is substantially the same as provided in H.R. 6747.

The new review formula is a departure from the substantial evidence rule. Specifically the bill requires that the findings of the Secretary shall be based on a "fair evaluation of the entire record at such hearing" including the report of the scientific advisory committee. The change in the rule provides that the Appellate Court shall not sustain the order of the Secretary if he failed to base his findings on a fair evaluation of the entire record.

The controversial Section on functional value has been deleted and the bill now contains no reference to the term functional value. It does, however, contain a provision to the effect that if, in the judgment of the Secretary, a tolerance is required in order to assure that the proposed use will be safe, the Secretary shall not (A) fix the tolerance at a level higher than he finds to be reasonable required to accomplish the physical or technical effect

for which such substance is intended, nor (B) establish a regulation for such proposed use if he finds that the data before him do not establish that such use would accomplish the intended physical or other technical effect.

The emergence of this legislation (assuming that a bill will be reported out by both committees) marks the culmination of about eight years of struggle with a difficult subject. The cause of the difficulty is no mystery. This is a grey area with few precise facts. It is fraught with emotions, prejudice and fanatical ideas, and is highly subject to competitive pressures and arbitrary action. In spite of the laborious and exhaustive drafting, the result will be control by men rather than by law, because of the impossibility of prescribing the dictates of sound judgment and impartiality.

Under one type of administration this law could be constructively enforced with a minimum of burden—under another it could defeat progress and greatly add to the cost of food. And under yet another it could be highly subject to abuse, because of the huge stakes involved.

The anomaly is that the public could hardly get any better, safer or cheaper food than it now has under the system of legal responsibility for integrity of product.

Passage of this bill will by no means foreclose this area as a subject of administrative law inquiry.

JOHN A. GOSNELL, *Chairman*

REPORT OF THE COMMITTEE ON HEALTH, EDUCATION AND WELFARE MATTERS

At the Midyear meeting of the Council of the Section held in Atlanta, Georgia on February 22-23, 1958, there was created a new Section Committee on Health, Education and Welfare (excluding only those activities relating to Food and Drug matters).

While the new Committee is still in an organizational stage, a matter of prime importance has been directed to it. House Document No. 394, 85th Congress, 2nd Session states that the Social Security Administration of the Department of Health, Education and Welfare is requesting Congressional authority to appoint hearing examiners to hold hearings under Title II of the Social Security Act, as amended, without regard to the provisions of the Administrative Procedure Act, for a period not to extend beyond December 31, 1959.

By letter dated June 16, 1958, the Chairman of the Section advised the Chairman of the Congressional subcommittee before which this matter is now pending that the Section "is authorized by the American Bar Association to take action necessary to preserve the gains made by the adoption of the Administrative Procedure Act" and requested an opportunity for a Section representative to be heard. The Chairman also stated:

> "We believe the requested authority to appoint trial examiners without compliance with the Administrative Procedure Act is highly inadvisable and should not be approved. The Department's proceedings for which exempt hearing officials are sought constitutes disputes between a citizen and the Department. These disputes are to litigate the Department's prior administrative denial of the citizen's claim. The citizen is entitled to a fair hearing before an impartial hearing officer who can exercise some independence of judgment. Under the exemption authority requested these principles would be disregarded. The hearing would be before a subordinate employee. This would contravene what Congress has determined essential to fair play in such situations where the agency is a judge in its own behalf. We believe the Department can work out appropriate procedures with the Civil

Service Commission for appointment of temporary trial examiners without compromising basic safeguards."

Hearings were held in connection with this matter on June 25, 1958 at which time the Chairman of the Section with the undersigned appeared to state the views of the Section as expressed above.

JEROME H. SIMONDS, *Chairman*

REPORT OF THE COMMITTEE ON HEARING EXAMINERS

The only activity of the Committee on Hearing Examiners has been to render some informal assistance to the Committee on Office of Federal Administrative Practice Act in connection with the presentation to Congress, and to members of the bar, of arguments in support of the Federal Administrative Practice Reorganization Act of 1957—S. 932.

In the opinion of the Committee, the provisions of this bill constitute a significant initial step in what must necessarily be a long term effort to increase the stature of hearing examiners in Federal administrative agencies. Enactment of the bill is desirable for the further reason that long overdue increases in hearing examiner salary levels is apparently tied in to action on S. 932.

From a long range point of view, however, it is thought that the provisions of this bill constitute only a first step, and that eventually further legislation will be desirable to the end of increasing the responsibilities of such hearing examiners.

It is suggested that an appropriate next step would be to accord greater weight to the hearing officers' findings of fact, by adoption of legislation stating and restricting the extent to which such findings would be subject to revision on agency review.

FRANK E. COOPER, *Chairman*

Mr. Edgar Watkins, while generally accepting the above report, wishes to note his strong opposition to the inclusion of the provisions of Section 211(b) in S. 932.

REPORT OF THE COMMITTEE ON IMMIGRATION AND NATIONALITY

No. 1. *"Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> 'That it is the opinion of the American Bar Association that the immigration and nationality laws of the United States be amended to provide for a 10-year statute of limitations within which proceedings for deportation and revocation of naturalization must be instituted, and
>
> 'That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end and take such other steps as it deems appropriate to carry out this resolution.' "

No. 2. *"Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> *'Be It Resolved,* That it is the opinion of the American Bar Association that the fees charged by the Immigration and Naturalization service are out of proportion to those charged in the Federal Courts and by other administrative agencies, that no fees should be charged in connection with the filing of motions or applications for discretionary relief and that the only fees which should be exacted in exclusion and deportation cases are those presently required to take an appeal to the Board of Immigration Appeals.
>
> 'That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end and take such other steps as it deems appropriate to carry out this resolution.' "

1. *Present American Bar Association's Resolutions on Immigration and Nationality.*

The activities of the Committee on Immigration and Nationality in recent years have resulted in six resolutions which have become official American Bar Association policy on the following subjects:

1. Establishment of a Board of Visa Appeals with power to review a Consul's denial of a visa.
2. Statutory status and authority for the Board of Immigration Appeals.

3. Applicability of Administrative Procedure Act to appointment of hearing officers and to all immigration hearings.

4. Determination of exclusion to be made only after hearing and on the basis of record evidence.

5. Right to judicial determination of claim of nationality.

6. Preservation of judicial review of deportation and exclusion orders under the Administrative Procedure Act, without restriction.

A seventh resolution was adopted by the Committee on Immigration and Nationality during this past year, and approved by the Board of Governors during its May 1958 meeting as official ABA policy, as to the following:

7. Consolidation into the Department of Justice or an independent agency of government of the immigration and nationality responsibilities now vested by law separately in the Department of State and in the Attorney General.

II. *Resolutions Presented for Approval.*

No. 1. *Statute of Limitations in Deportation and Revocation of Naturalization.*

The Immigration and Nationality Act of 1952 contains no statute of limitations concerning the period within which proceedings for deportation and denaturalization may be instituted. For 65 years prior to the 1952 act, the immigration law had a statute of limitations on deportation, and no showing has been made of the need to depart from this 65-year practice.

Present Situation

I. *Deportation*

1. For 65 years prior to the 1952 law there had been a statute of limitations on deportation proceedings. From 1917, there was a general five-year period of limitations for bringing deportation proceedings after improper entry, except for

(a) deportable offenses committed in the United States;

(b) subversive aliens; and

(c) entry in violation of quota requirements or with improper visa.

2. Under the 1952 Act, all statutes of limitations are eliminated, and deportation proceedings can be brought at any time, no matter how remote from the improper entry. [§ 241.]

(a) Although there is no period of limitations whatsoever for bringing deportation proceedings, in three instances the statute specifies that the ground of deportation must have occurred "within five years after entry": institutionalization at public expense for mental disease [§ 241(a)(3)], public charge [§ 241(a)(8)], conviction of violations of the provisions of Title I of the Alien Registration Act of 1940 [§ 241(a)(15)].

(b) The 1952 Act retroactively eliminated previous statutes of limitations, § 241(d).

II. *Naturalization*

1. Our naturalization laws have never contained a statute of limitations on the time during which proceedings could be instituted to revoke naturalization.

2. The 1952 Act, § 340, continues this policy.

(a) There are two provisions which specify that the ground for such revocation of naturalization must have occurred within a specified number of years after naturalization: 10 years for conviction for refusal to testify before a congressional committee concerning his subversive activities [§ 340(a)], and five years for taking up permanent residence in any foreign country [§ 340(c)].

Purpose and Operation of Statutes of Limitations

1. Statutes of limitations have a two-fold purpose, to protect innocent persons from prosecution of claims at a time when evidence in defense is not available, and to spare the courts from litigation of stale claims "after memories have faded, witnesses died or disappeared, and evidence lost." *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1944).

2. Under the Federal criminal law, a general five-year statute of limitations is applicable to crimes not punishable by death. 18 USC § 3282. Arson, robbery, burglary, forgery, white slave traffic, assault with a deadly weapon, and larceny are punishable only if proceedings are instituted within five years.

3. Likewise, civil actions are subject to statutes of limitations, of varying periods.

4. The Internal Security Act of 1950, § 4(e), provided a 10-year statute of limitations for conspiracy to establish a totalitarian dictatorship in the United States under foreign domination or control.

5. Under the Federal criminal law, fraudulent procurement of citizenship or naturalization is subject to a 10-year statute of limitations. 18 USC § 3291.

Rationale for Present Law

The major report of the Senate Judiciary Committee leading to the enactment of the 1952 law, justified the present provisions as follows:

> "It is the recommendation of the subcommittee that the time limitation on the deportation after entry should be eliminated. If the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the five years after entry . . . all aliens who become public charges at any time after entry . . . should be subject to deportation at any time . . ." (Sen. Rep. No. 1515, 81st Cong., 2nd Sess., pp. 389-390).

President's Position

On April 6, 1953, President Eisenhower wrote to Senator Watkins, chairman of the immigration subcommittee of the Senate Judiciary Committee, in connection with proposed hearings. The President said, in part:

> ". . . I am particularly grateful to have your assurance that you are prepared to co-operate in the formulation and implementation of an improved immigration program, insofar as you can consistently do so . . .
>
> In the state of the Union message I pointed out that existing legislation contains injustices. Among the administrative provisions of the law which it is claimed may operate with unwarranted harshness are the following: . . .
>
> 8. Deportation provisions that permit an alien to be deported at any time after entry, irrespective of how long ago he was involved, after entry, in any action or affiliation designated as "subversive" . . .
>
> It would seem desirable for the Committee on the Judiciary to investigate these complaints and the other critical comments which have developed as a result of the operation of the immigration and naturalization law of 1952 with a view to achieving legislation which would be fair and just to all . . ."

Congressional Recommendations

The House Committee on Immigration, 79th Cong., 1st Sess., H. Rep. No. 1312, p. 16, recommended a 10-year statute of limitations on deportation under the 1924 Immigration Act.

Recommendation of Presidential Commission

The President's Commission on Immigration and Naturalization in its 1953 report, had the following to say as to periods of limitation on deportation:

> "That it is wrong to keep the threat of punishment indefinitely over the head of one who breaks the law is a principle deeply rooted in the ancient traditions of our legal system. The law requires that criminal prosecutions, except for capital offenses, such as murder and treason, be brought within a fixed period of time or not at all. A similar dispensation governs the enforcement of civil liabilities . . .
>
> Indeed, the 1952 statute retroactively rescinded the limited statute of limitations fixed by previous law. An alien who entered the United States 25 years ago, and whose entry involved a purely technical violation, enjoyed immunity from deportation for the last 20 years. Under the 1952 Act, he is now again subject to deportation. That Act threatens the security of many aliens and their families. Their immunities have been removed, and they may be torn out of their accustomed places in the communities in which they live, no matter how exemplary their conduct over a long period of years . . . the new act actually restores the threat of cruel and inhuman punishment for offenses long since forgiven.
>
> This undue severity is underscored by the fact that although prosecutions for aggravated criminal violations of the immigration laws are subject to a 3-year statute of limitations, deportation proceedings for such violations—as well as for infractions which offend no criminal law—are governed by no statute of limitations and may be brought—more than say 20 or 40 years after an alien entered the United States. No one has suggested any sound reason why the purpose of limitations—recognition of the unfairness involved in requiring a person to make a defense long after the event when it is difficult or impossible to assemble witnesses and evidence—does not apply to immigration matters at least with equal force as to prosecutions for serious crimes.
>
> It is said that the existence of a statute of limitations would encourage aliens to enter the United States in violation of the

immigration laws. A person who enters or remains in the United States in violation of the immigration laws should be subject to deportation from the United States. But the consequences of such a violation should be enforced against him within a reasonable time. There is a fundamental public purpose which is served by statutes of limitations for crimes and in civil actions. This is just as important an objective of law enforcement as the avoidance of violation of law." [pp. 197-198]

The Commission recommended

"that the immigration statute should provide that a deportation proceeding may not be commenced against any alien more than 10 years after the violation occurred." [pp. 197-198]

As to revocation of naturalization, the Commission said:

"Elsewhere (chapter 13) the Commission recommends that a 10-year statute of limitations be established for the commencement of deportation proceedings against aliens who enter the United States illegally. The same considerations are controlling in relation to denaturalization. A person who obtains citizenship wrongfully should be subject to revocation of his citizenship.

The possibility that naturalization may be revoked at any time is a threat against the stability of status of all naturalized citizens. Obviously, too, the lapse of time may cause significant changes in circumstances as a result of which the rights of innocent third persons may become involved." [p. 249]

The Commission recommended a 10-year statute of limitations for denaturalization proceedings.

Analysis of Situation

After study of this situation, the Committee reached the following conclusions:

(1) Persons who have entered the United States illegally, or who have improperly obtained naturalization, should be subject to removal of the status so improperly attained;

(2) But the absence of a statute of limitations covering deportation and denaturalization is an undesirable departure from basic principles of law. There is no valid reason for denying to such persons what is basic to our jurisprudence, protection from raking up old and dead issues after a reasonable period of time, after which memories of witnesses have faded, contemporaneous sources of information are no longer available, and the general peace of the community would be unduly upset. Under present law, an

alien can be deported and a citizen denaturalized for something that took place 50 years ago, even if it were only of a purely minor technical character. This means that people who have lived substantially their entire lives in the United States can be torn away from their families and sent to lands which are utterly foreign to them;

(3) There is no showing whatsoever of a need for a change in the 65-year old practice of a statute of limitations for deportation;

(4) The failure to provide for a reasonable period of limitations, after which deportation and denaturalization proceedings are barred, is unjust, unwarranted, and contrary to the fundamental pattern of American law; and

(5) In view of the present pattern of statutes of limitations in Federal law, a strong argument could be advanced for a 5-year statute of limitations for deportation and denaturalization. However, in view of the recommendations by a Congressional Committee and a Presidential Commission for a 10-year period, the Committee recommends a 10-year statute of limitations for instituting deportation and denaturalization proceedings.

Resolution

The Committee on Immigration and Nationality adopted, and submits for approval, the above resolution to amend the law in order to provide a 10-year statute of limitations for instituting deportation and denaturalization proceedings.

No. 2. *Filing Fees in Immigration Matters*

The regulations, 8 CFR 2.5, prescribe an extensive list of fees in immigration cases. Although the vast majority of aliens involved in immigration proceedings are poor, the prescribed fees are excessive. Take a typical deportation case. An alien applies for suspension of deportation. With his application, he must pay a fee of $25. If his application is denied and he appeals to the Board of Immigration Appeals, another fee of $25 must be paid. If he is turned down by the Board and seeks reconsideration, he must pay a third fee of $25. If a final order of deportation is issued, and if he seeks suspension upon the grounds of physical persecution, he must pay a further $25, thus making a total expenditure of $100 for filing fees alone.

To the best of our knowledge, such fees are out of proportion to those prescribed by other governmental agencies. Fees for patent and trade-mark applications are $25. Passport fees are $10. Visa fees are $25. District Court fees are $10 for filing and $1.00

for service of process. In these proceedings interlocutory motions, motions during and after trial, applications for stays and for reconsideration involve no fees. And no fees at all are charged in the Interstate Commerce Commission, the Federal Power Commission, the National Labor Relations Board, the Atomic Energy Commission, the Civil Aeronautics Board, the Pardon Board, or the Alien Property Office.

The result of the high and cumulative fees in immigration cases may well be to deter people from a determination of their rights under the laws of the United States.

III. *Committee's Activities in Administrative Realm.*

During the past year, the following actions were taken in relation to administrative matters:

(1) The Attorney General was requested to re-examine the Department's present policy to the end that all future appointments of hearing examiners should be made under the APA.

(2) The Attorney General was requested to reconsider the Department's policy to the end of reducing excessive filing fees required in administrative immigration matters.

(3) The Office of Administrative Procedure in the Department of Justice was requested to include in its future annual reports statistics on hearings conducted by special inquiry officers, despite the fact that such officers were not appointed under APA.

(4) The Board of Immigration Appeals was requested to designate a very much larger number of its decisions as "precedent decisions," thus making them available to the Bar and the public.

(5) A subcommittee was appointed to study the report of the House Committee on Government Operations, "Survey & Study of Administrative Organizations, Procedure and Practice in the Federal Agencies—Agency Response to Questionnaire," particularly Part 6 (Department of Justice) and Part 9 (Department of State).

IV. *Legislative Developments.*

As this report is submitted, the legislative status and prospects of current immigration bills are still not final. With Section approval, the Committee has indicated the American Bar Association's desire to be heard in any general immigration hearings which may be scheduled, but no decision has been reached as to

whether such general immigration hearings will be held this year. However, other activity has taken place in Congress:

(1) The House of Representatives on May 5, 1958, passed H.R. 11033 (Feighan), which would adjust the status of Hungarian refugees and escapees who fled during the October, 1956 uprising in Hungary. This bill, which seems likely of enactment, would provide permanent residence for those Hungarians who were paroled into the United States.

(2) The House Judiciary Committee favorably reported on H.R. 11874 (Walter), which would amend § 249(a) of the 1952 Act so as to permit the creation of a record of lawful admission for aliens who entered the United States prior to June 28, 1940 (instead of July 1, 1924, as under present law). The House passed this bill, with Committee amendments, on June 2, 1958.

(3) H.R. 12441 (Metcalf) would amend § 103 (b) of the 1952 Act to require that the Commissioner of Immigration and Naturalization be a lawyer. This bill has not yet been reviewed by the Judiciary Committee.

(4) H.R. 13311 (Walter) would restrict judicial review of orders of deportation and exclusion in a variety of ways, including elimination of judicial review at the District Court level, barring of declaratory judgment actions, and limitation of venue *inter al.* Effort seems to be likely to report this bill out promptly despite its introduction late in the session. Hearings were held on this bill in mid-July, 1958. Your Committee's Chairman testified in opposition to the enactment of the bill on the ground that it was unnecessary; that the form of judicial review proposed by the bill was inappropriate to immigration matters; and that the bill seriously and unwisely restricts judicial review now available under the Administrative Procedure Act.

In connection with several other bills introduced, a subcommittee was appointed to study and report on S. 2416 (Cotton), H.R. 8339 (Hiestand), and H.R. 9352 and H.R. 9937 (both Walter). These bills would effectuate pertinent recommendations of the [Wright] Commission on Government Security.

HARRY N. ROSENFIELD, *Chairman*

REPORT OF THE COMMITTEE ON INDIAN MATTERS

The interest and activity of the Committee on Indian Matters has been confined primarily to six major projects or fields of study and interest:

1. *Revision of 25 U.S.C. § 81 dealing with execution of contracts with Indian tribes.* A study by the Committee of existing legislation dealing with the relationship between the United States and attorneys representing individual Indians and Indian tribes has revealed need for amendment of existing law to eliminate archaic requirements for execution of contracts with Indian tribes before judges of courts of record and for detailed accounts of services rendered in support of the charges under the contracts. As a result of the study, others have become interested in eliminating these requirements. Senator Jackson introduced S. 2592 to amend the law relating to the execution of contracts with Indian tribes by eliminating the requirements for execution of such contracts before a judge of a court of record. That bill passed the Senate on May 1, 1958. At the time of the submission of this report it is under consideration by the House Committee on Interior and Insular Affairs. It is hoped that this bill will be favorably reported and enacted into law during the current session of Congress. If it has not been enacted by the time of the annual meeting, it is the recommendation of the Committee that the Administrative Law Section take necessary action to obtain Association endorsement of the legislation.

2. *Efforts to review the Department of the Interior revision of the Handbook of Federal Indian Law prior to its publication.* At the request and direction of the 84th Congress, the Solicitor of the Department of the Interior was authorized to revise and bring up to date the Handbook of Federal Indian Law originally prepared under the late Felix S. Cohen, former Associate Solicitor of the Department. The Handbook is the only recognized publication which purports to be a treatise on Indian law. It, therefore, plays an important part in the administration of Indian affairs. For this reason it has been felt that change in the publication should not be made without benefit of public comment on the proposed changes.

The Solicitor employed a qualified lawyer, formerly of the staff

of the Library of Congress Legislative Reference Service, to make the revision. The revision, in turn, has been reviewed within the department by other competent lawyers. The Committee on Indian Matters, which includes within its membership lawyers with broad experience in Indian matters, as a public service, offered to have its members review the draft of the revision and, before its publication to make formal suggestions for its improvement in content. However, despite the request of the Senate Subcommittee on Indian Affairs, which initiated the project, that all available sources of information be considered for the revision, the Solicitor has stated he is unable to allow the Committee to see or review the draft before publication. Therefore, despite much effort and expenditure of time, the Committee for reasons beyond its control has been unable to conclude one of its most important projects.

3. *Study of the practice of the Department of the Interior with respect to service of process or its equivalent on individual Indians or Indian tribes in protest, contests and appeals arising out of decisions of the Bureau of Indian Affairs.* Frequently non-Indians seek relief from regulations or are aggrieved by decisions of the Department arising out of transactions relating to Indian property or funds. The property right at stake may belong to the Indian or the tribe. For example, where a bidder on a tribal oil and gas lease seeks refund of his deposit after the bid is accepted, the money involved belongs either to the tribe or the bidder. The practice of the Department of the Interior has been to decide the matter on the representation of the aggrieved party, without notice to the Indian or the tribe concerned. This has received study by the Committee which recommends not only that provision be made in regulations for the service of notice but that the procedure for appeals be clearly outlined in the regulations.

The Committee is advised that the Department of the Interior has given this problem serious study and that regulations have been drafted and approved on several levels to provide a form of procedure for Indians and Indian tribes to prosecute appeals and providing for adequate notice to the individual Indian or the tribe involved. It is hoped that adequate regulations will be adopted and promulgated within the very near future.

4. *Compilation of list of attorneys interested in Indian matters.* It has been suggested that the Committee form an advisory group of attorneys interested in Indian matters, to which matters of consequence could be referred by the Committee for advisory comment. Through the courtesy of Deputy Commissioner W. Barton Greenwood and James E. Dwight, Esq., the Bureau of Indian

Affairs has made available to the Committee a complete list of all attorneys interested in contracts to represent Indian tribes or groups, approved by the Department of the Interior. This list has been compiled and revised by the Committee as an aid in keeping better informed on the views of the Bar interested in administrative law in the field of Indian matters.

5. *The application of the Administrative Procedure Act to proceedings in the Bureau of Indian Affairs.* The Committee has made a preliminary inquiry into the question of application of the Administrative Procedure Act to proceedings in the Bureau of Indian Affairs and the related problem of the positions of Indian probate examiners as related to administrative practice. The preliminary check has disclosed the need for a careful study of this area, including development of further factual background, and obtaining the views of the Department of the Interior, interested persons, hearing examiners and Indian probate examiners. More information must be developed as to actual practice in various situations. It is recommended that this be an area of primary emphasis for the Committee next year.

6. *Program to complete and bring to date Kappler's Indian Affairs, Laws and Treaties.* Previously the Committee has volunteered to Congress to do the lawyer work necessary to prepare a supplement to the basic five volume compilation of legislation in the field of Indian matters. It is proposed to compile all laws and treaties dealing with Indian matters subsequent to June 29, 1938 and to include any pre-June 29, 1938 matter omitted from the original publication. Congress has been requested to make funds available for costs of stenographic services, reproduction costs and a professional indexor. Efforts to interest Congress in this project have not proved successful. It is recommended that the Committee continue to study this matter and further pursue the project.

ROBERT W. BARKER, *Chairman*

REPORT OF THE COMMITTEE ON INTERSTATE COMMERCE ACT

This Committee held two meetings during the year; both were held in Washington, D. C. Below are shown the subjects given consideration by this Committee and the views of the Committee in respect of each.

The Administrative Court Bills; H.R. 8751 and S. 2292

The only change affecting the I.C.C. proposed by these bills is that the Administrative Court, rather than the Commission, be given jurisdiction to enforce compliance with certain sections (particularly section 7) of the Clayton Act. The Commission would still initiate enforcement proceedings. The Committee has no recommendation to make on these bills.

Bill to Amend Sections 2322 and 2323 of the Judicial Code, Title 28, United States Code

We have given consideration to H.R. 6085 and S. 1721, the purpose of which is to make the Interstate Commerce Commission, rather than the United States, the defendant in proceedings to set aside or suspend orders of the Interstate Commerce Commission.

We are in accord with the purpose but we think that the bill should be amended to provide that in Section 2323 of Title 28 of the United States Code the parties to the proceeding should be notified of any such action. This Section now allows all such parties to intervene. Notice of the filing of such an action would help the right to intervene but would not be as burdensome as requiring service on all parties. This is particularly important in proceedings where the parties before the Commission are widely separated.

The proposed bill also provides that in such actions, the attorney general may appear when the United States or any department or agency thereof has a legal interest adversely affected. While we agree that the Commission should be the defendant, we see no reason to limit the participation of the Department of Justice if they so desire.

The Proposed Code of Administrative Procedure

The proposed Code of Administrative Procedure, which this Association has endorsed, if enacted, would change to a considerable extent administrative procedures established by the Interstate Commerce Act. However, until specific legislation is introduced in Congress to make effective the Association's proposed code, this committee cannot determine precisely which sections of the Interstate Commerce Act will be affected. The matter is being closely watched and at the appropriate time—namely, after the legislation is introduced—a report consistent with the responsibilities of this committee will be presented to the Section.

Federal Administration Practice Reorganization Act of 1957

We have examined H.R. 3349, H.R. 3350, H.R. 7006, and S. 932, all of which are identical and are referred to as proposed "Federal Administrative Practice Reorganization Act of 1957." These bills are long and cover five different subjects:

TITLE I—Office of Federal Administrative Practice
TITLE II—Hearing Commissioners
TITLE III—Legal Career Services
TITLE IV—Admission to and Control of Practice
TITLE V—General Provisions

A study of these bills indicates that only one part is in conflict with the Interstate Commerce Act which is within the purview of this Committee. Section 211(b) of the proposed bill reads:

> "(b) Except where otherwise provided by statute or by regulations of the Director, the hearing commissioner who presides at a proceeding shall make and file an initial decision which within the time provided shall become the decision of the agency in the absence of an appeal before the agency upon its motion or upon the filing of exception by a party."

First, we call attention to the fact that this section makes a substantive change in the law as laid down in Section 8 of the Administrative Procedure Act. In our opinion, no substantive change in the procedure of the Interstate Commerce Commission should be made in a bill dealing with the qualifications, tenure, compensation and assignments of hearing commissioners. If such a matter is to be proposed, it should be included in a proposed

administrative procedure code intended to be a substitute for the Administrative Procedure Act.

Section 17(3) of the Interstate Commerce Act reads in part:

> "The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States.

Under this power the Commission has set up procedures in order to expedite the handling of cases. The examiners employed by the Commission render proposed or recommended reports in some cases, but not in all. The Administrative Procedure Act recognizes this practice and presently allows the omission when "the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." The omission of such reports has been extensively used where speed is necessary.

Sections 15(7), 218(c), 307(i), and 406(e) of the Interstate Commerce Act allows only seven months for the completion of the handling of a suspension case. In the latest volume of rate decisions, Volume 301, the Commission decided 89 investigation and suspension cases and in 72 of them, the initial report was omitted in order to complete the handling of these cases before the expiration of the seven month period.

No case of miscarriage of justice has been brought to the attention of this Committee as a result of such omissions and in the absence of any such evidence, we feel that no change should be made in the present procedure, particularly one that would delay the disposition of cases. The prevention of the omission of initial reports in such cases would only tend to increase the work of the Commission and its staff and to further delay the disposition of many cases which can be dealt with by a Division with no harm to any parties concerned.

BYRON M. GRAY, *Chairman*

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW

The reports submitted by our Committee to the Council, at the mid-year meeting, and the action taken thereon are summarized at 10 Ad. Law Bull. [9] 69.

The ABA proposed revision of the Administrative Procedure Act provides cross-the-board judicial review in Section 1009, and abandons the many exceptions specified in or engrafted upon Section 10 of that Act. The Committee has tested each of the bills submitted to it by that revision and employed them as illustrations of the situation which will be remedied by expanded judicial review.

I

One bill merits reconsideration by the Council and consideration by the Section. This is H.R. 6829, a bill granting persons in the Civil Service a hearing before removal or suspension and the right to judicial review. An analysis of the bill is set out in 9 Ad. Law Bull. 256-257. At the July 1957 meeting in New York, the Committee was instructed by the Section to clear the bill with the Standing Committee on Civil Service. That Committee has since endorsed our report. 10 Ad. Law Bull. 10.

Congressman Keating, explaining his own later bill, stated that

> "Congress has passed many statutes providing procedural safeguards for Federal workers against arbitrary removals and suspensions. But it has never really safeguarded these rights by providing for review and enforcement in the courts. This measure will assure Federal employees that their hard-won protections are not empty declarations immune from adequate judicial scrutiny." Press release, Nov. 30, 1957.

H.R. 6829 deserves the approval of the Section as an implementation of Section 1009.

II

The Committee has submitted for the annual meeting a report on S. 2036, a bill to provide a hearing to applicants for correction

of their military records and for judicial review. The necessity for clarifying and expanding judicial review is pointed up by (1) the fact that the Army itself concluded at long last that in many cases "the earlier findings now appear too harsh," and (2) its remarkable claim that even illegal discharges are insulated from judicial review. Though that claim was rejected in *Harmon* v. *Brucker,* 2 L. Ed. (2d) 503, the Court apparently regarded the case as a suit against a wrong-doer who could be sued in his individual capacity. For the unsatisfactory nature of such suits see the *Land* v. *Dollar* litigation wherein a private litigant prevailed only to be faced by a counter suit by the United States under claim that judgments against the "individual" are not binding upon the United States. *Land* v. *Dollar,* 330 U.S. 731, 739.

III

I urge the Section not to falter in its sponsorship of cross-the-board judicial review. There is hardly a sector of contemporary life for which some protagonist will not claim immunity from review. This one would withhold it from deportees, another from those accused of subversion, a third from discharged soldiers, et cetera, et cetera.

Denial of review to one American serves tomorrow as a precedent for denial to another. In an article written since the ABA revisors laid down their labors, Professor Jaffe states:

> "The guarantee of *legality* by an organ independent of the Executive is one of the profoundest, most pervasive premises of our system." *The Right to Judicial Review,* 71 Harv. L. Rev. 401, 406 (1958).

And he declares that

> "in our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Id. at 420.

It should be a source of pride to the Section that this "presumption" was first given embodiment by the draftsmen of the Stason Committee. *Every* American is entitled to the guarantee of "legality."

RAOUL BERGER, *Chairman*

Annex

Attached to this report is a recommendation on S. 2036.

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

Be It Resolved, That the American Bar Association support the enactment of S. 2036, 85th Cong., 1st Sess., a bill to provide an administrative hearing to an applicant for correction of his military record and to provide judicial review, with the following amendments:

(a) Confer jurisdiction to review on the United States District Courts rather than the Court of Claims;

(b) Strike the provision for examination and cross-examination of subordinate opinion writing officers by the respective Boards;

(c) Change the existing discretionary nature of administrative relief to conform to the proposed judicial affirmance if supported by a preponderance of the evidence;

(d) Eliminate the provision for finality of the initial judicial decision;

(e) Provide safeguards against the use of classified information."

S. 2036 would amend 10 U.S.C. Sec. 1552 [1] to provide (a) an opportunity for administrative hearing before the appropriate board to an applicant for correction of his military record; (b) authority to the Board to require the appearance of any member of the Armed Forces who has personal knowledge of the facts relevant to the Board's decision, or who has written an opinion which is before the Board in connection with the proceeding; (c) judicial review in the Court of Claims to any claimant aggrieved by the decision of such Board; (d) judicial review to be on the basis of the record made by the Board (plus additional evidence introduced for good cause shown), and the Board's decision to be affirmed if supported by a preponderance of the evidence.

Presently the Secretaries of the Army and Navy, and the Secretary of the Treasury (re the Coast Guard) acting through civilian boards are authorized to correct

> "any military or naval record where *in their judgment* such action is necessary to correct an error or to remove an injustice." 5 U.S.C. Sec. 191a.

[1] Formerly 5 U.S.C. Sec. 191(a) (Supp.).

This provision is administratively construed to make review a matter of grace. And cf. 40 Op. Atty. Gen. 504.

An unjust dishonorable discharge can haunt a man throughout his civilian life. One who has been discharged on alleged "security" or "homosexuality" grounds, for example, will find little favor as a college teacher, as a government employee, or in a "defense" plant. Thus real hurt can flow from an erroneous discharge. Moreover, in time of war, the services deal with millions of men, and being under the pressure of demands that transcend the individual necessarily must be content with rough-hewn justice.

On December 24, 1957, the newspapers reported that the Army is reviewing the case of every soldier discharged as a security risk between 1948 and 1955, and that when

> "the earlier findings now appear too harsh, the nature of the man's discharge has been upgraded . . . Changes have been made in almost half the cases reviewed so far . . ."

It is laudable that the Army voluntarily undertook this program. But had judicial review been available, such corrections could have been made much earlier and needless suffering avoided. Nor should relief from injury be a matter of grace.

It needs to be said that the present Boards of Review have performed their tasks creditably. But we believe that one who suffers under an erroneous discharge should have a right to a hearing rather than a hearing which is discretionary, and that one whose application for relief is administratively denied is "adversely affected or aggrieved" in the truest sense. That is the test of judicial review under the proposed ABA revision of the Administrative Procedure Act and we see no special reason to deny such review here. Accordingly, we recommend that the provision for a hearing and for judicial review be approved. A number of subsidiary matters require separate comment.

1. A word respecting what superficially appears as a potential conflict of jurisdiction. The Court of Military Appeals has jurisdiction to review sentences or findings of general courts martial sent up by the Judge Advocate General or allowed for good cause by the court on petition of the accused. 50 U.S.C. Sec. 654. The Attorney General earlier concluded that provisions for finality of court martial proceedings did not affect the existing administrative authority to correct the record of discharge resulting there-

from. 41 Op. Atty. Gen. Dec. 29, 1949; cf. 40 Op. Atty. Gen. 504. Consequently, it would seem that the proposed judicial review of military record corrections does not conflict with the existing review of court martial sentences.

2. The provision in sub-section (h) authorizing the Board to examine or cross-examine one who has written an opinion in the case at a lower level seems to us undesirable. It is as if the Federal Trade Commission could subject a Trial Examiner to cross-examination with respect to how he reached his opinion. Such a practice is capable of intimidating and degrading the deciding authorities. It is enough that the correction of error is made possible by review. If more is desired, provision may be made for *de novo* review at the higher administrative level. We recommend that this provision be stricken.

3. The jurisdiction to review a Board's decision is lodged in the Court of Claims. We recommend that it be vested in the United States District Courts, in conformity with Sec. 1009(c) of the proposed ABA revision of the APA. Uniform review procedures should be employed unless there exist important reasons for departure. Moreover, ex-service men should not be put to the expense of litigating in Washington before the Court of Claims, but should be given relief locally.

4. Sec. 2(c) requires judicial affirmance only if the board's decision "is supported by a preponderance of the evidence." This provision is another illustration of growing dissatisfaction with the operation of the "substantial" evidence rule, which the proposed ABA revision would supplant with the "clearly" erroneous rule. We believe that experiments on various agency sectors may help to develop a satisfactory substitute for the "substantial" evidence rule, and we therefore recommend that this provision be endorsed. Attention is directed, however, to the fact that Sec. 191a(a) now authorizes the respective Secretaries

> "to correct any military or Naval record where *in their judgment* such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government . . ."

This provision, which makes the test whether "in [the Secretary's] judgment" corrective relief is needed, is at war with a judicial inquiry whether his judgment is supported by a preponderance of the evidence. The latter formula posits the *existence* of facts

to support the administrative judgment, not a subjective judgment about them. We consider that redress of a real injury should not be left at the mercy of an administrator's subjective, and in effect unreviewable, judgment. Cf. *Work* v. *Rives,* 267 U.S. 175. Accordingly we recommend the elision of the words "in their judgment" from Sec. 191a(a) in order to bring it into harmony with the proposed Sec. 2(c) of the Bill.

5. Section 2(c) of the bill concludes by saying that "the judgment of the court [Court of Claims] shall be final." If this means that certiorari to the Supreme Court would be unavailable, we are opposed to it. Decisions by the Boards of Review affect substantial rights of ex-servicemen and we believe that full judicial, including appellate, review should be available. The importance of keeping channels to the Supreme Court open is illustrated by *Harmon* v. *Brucker,* 2 L. Ed. (2d) 503, where the Army's contention that even illegal discharges are insulated from judicial review was rejected. Our earlier suggestion that the initial review be confided to the United States District Courts would result in an anomalous exception from review by the Circuit Courts of Appeals if "finality" is retained at the first stage of judicial review.

6. The bill provides for making a record of "all proceedings before the board," for filing "in the court a transcript of the record upon which the decision of the board was made," and for court decision "on the basis of the record before the court." From this we deduce that the administrative, and certainly the judicial, record shall be made up of materials which are properly made part of the record, i.e., subject to cross-examination and the like. But it appears that under the regulations (A.R. 15-185, July 18, 1955), the proceeding before the Army Board for the Correction of Military Records is subject to the rule that classified or privileged matter will not be disclosed or made available without express findings by the Chairman that such disclosure is required in the case and is not detrimental to the public interest. Confrontation and access to classified records may not be possible in every case, but the proposed legislation should at least have such a safeguard as is provided in Sec. 1005(f) of the ABA proposed revision of the Administrative Procedure Act:

> "(f) National Security—In the case of agency proceedings or actions which involve the national security of the United States and for that reason must be kept secret, the agency shall provide by rule for such procedures parallel to those provided in this Act

as will effectively safeguard and prevent disclosure of classified information to unauthorized persons with minimum impairment of the procedural rights which would be available if classified information were not involved."

RAOUL BERGER, *Chairman*

Dissent:

Messrs. Schultz and Levenberg dissent from the Committee's endorsement of experiment with "preponderance of the evidence" on the ground that the

"substantial evidence standard gives the courts amply room to reverse board decisions which may be arbitrary or capricious or where due process is not accorded the applicant."

REPORT OF THE COMMITTEE ON MARITIME TRANSPORTATION

This Committee considered informally the problem of a Code of Ethics applicable to Maritime transportation. This subject is covered in part by the Interstate Commerce Commission which has long had a "Code of Ethics" adopted by its Association of Interstate Commerce Commission Practitioners. It is also subject in part to regulation by the Federal Maritime Board and by the Maritime Administrator. No comparable code has been promulgated by that agency.

The Chairman of the Committee submitted for Committee consideration the following resolution:

> *Resolved:* That the American Bar Association, through its Administrative Law Section and its Committee on Maritime Law, reaffirm its dedication to the Code of Ethics applicable to any controverted matter, and prescribe as a Code of Ethics for lawyers practicing before the Federal Maritime Board the following:
>
> 1. No lawyer or practitioner shall, at any time, discuss with any Commissioner, Examiner or other employee of the Federal Maritime Board any controversial matter such as the granting or withholding of any subsidy or level of rates, or conference matters or other license, right or benefit as to which other parties have or may claim conflicting interests except in public hearings, or by written communication with copy furnished at the time of writing to any other person believed to have a conflicting or different interest in the outcome thereof.
>
> 2. In the event of receipt by the Commission or its members or staff of any written communications from outside persons, in either public or private life, with respect to the disposition of any pending controverted matters, the communications shall be duly acknowledged and made public by placing in an official docket.
>
> 3. In the event of receipt of telephone calls or oral communications from outside persons either in public or private life, with respect to the disposition of any pending controverted matter, the caller shall be first courteously advised of a requirement that the substance of his communication must be summarized and then made public by placing in an official docket, and then such communications as he may express shall be fairly summarized and placed in a public record.

4. In order to permit the informal disposition of non-controverted administrative matters without undue "red tape" or formalities, it shall be appropriate at any time to request an informal conference with a Commissioner, Examiner or other employee of the Federal Maritime Board on any subject within its jurisdiction, provided that seasonable opportunity be thereafter given to any persons known or believed to have a different or conflicting point of view and like opportunity be afforded to present any differing point of view before adoption of any rule or regulation.

5. The purpose of these regulations is to implement the action of the Federal Maritime Board in dealing with all controversial matters in the fair and open manner required to constitute due process of law and to preserve a government of law and not of men, and the American Bar Association pledges its complete and vigorous support of these purposes and its desire to see them implemented in every possible way.

6. Wilful violation of this Code shall be grounds for proceeding of disbarment of attorneys or practitioners, or of removal from office of government officials and employees.

This resolution was also submitted informally to the Chairman of the Federal Maritime Board, and to the Chairmen of the Senate and House Committees on Interstate Commerce and to the Special Counsel to the President. Senator Magnuson's reply also called attention to a draft of proposed Canons of Ethics for Members of the Securities and Exchange Commission. The problem was informally discussed with Chairman Morse of the Federal Maritime Board and Mr. Gerald Morgan of the Executive Office, and with the Chairman of the Section of Administrative Law.

The resolution was considered informally at a meeting of the Maritime Transportation Committee in Washington, D. C. in April 1958 by Messrs. Stephan, Macleay, Kominers and Cunningham. It was approved in essence, but it was the consensus of belief of the Committee that any Code ultimately adopted should have broad application to all Federal administrative activities and should expressly recognize the difference between quasi-judicial functions of an agency decided under statutes requiring hearings on a formal record as contrasted with quasi-legislative or administrative activities in which Constitutional rights of petition to Congress and informal discussion and communication should be preserved in making such quasi-legislative policy determinations.

Thereafter the Chairman of this Committee was asked by Mr.

Beelar to serve as Chairman of a special *ad hoc* committee to submit a report on such a possible Code of Agency Conduct for broad application. The Maritime Transportation Committee thereupon decided that its efforts should be merged in this new undertaking. This will be the subject of a separate report.

ALBERT E. STEPHAN, *Chairman*

Separate statement of Clifford J. Hynning:

I have one major question with respect to your proposed resolution as set forth in your letter to Mr. Beelar under date of May 15—namely a special code of ethics for lawyers and other practitioners before administrative agencies. In general I deplore the tendencies of certain administrative agencies to set up special standards and permit requirements for lawyers before they can practice before the Department. It is my opinion that a member of the bar in good standing is in general required to conduct himself in accordance with canons of ethics of the American Bar Association and that the special canons should not be proliferated through the various special agencies. I therefore see no point in having a special code of ethics for lawyers practicing in the field of Maritime transportation, since these lawyers are already subject to the code of ethics of the American Bar Association.

The impetus of the present movement for a code of ethics relates to the conduct of agency members and their employees. There also, of course, remains the problem with respect to persons appearing as "practitioners" rather than as lawyers before the administrative agencies whose special rules recognize such practitioners who are not lawyers.

I therefore suggest that the problem be approached from two standpoints—(a) whether the canons of ethics of the ABA are sufficient to deal with the conduct of the lawyers appearing before an administrative agency, or do they need supplementation or changes; and (b) what standards of conduct should be made applicable to persons who are not subject to the ABA canons of ethics, namely practitioners, members and staff of agencies.

REPORT OF THE COMMITTEE ON MOBILIZATION

The Committee on Mobilization during the past year studied the adequacy of existing legislation in the field of administrative law to support the implementation of current national mobilization policies in the event of a general or limited conflict. As a result of its study, the Committee recommends for consideration by the Council the following resolution:

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

WHEREAS, Current assumptions relating to mobilization of the resources of the United States to defend itself against aggression in a general war involving nuclear attacks and in conflicts short of general war require substantial revision in our national mobilization policies.

WHEREAS, Existing legislation in the field of administrative law is not adequate to support fully these policies, and

WHEREAS, Additional legislation is required both on a current and on a stand-by basis to implement existing national mobilization policies,

Be It Resolved, That in order to implement national mobilization policy by adequate legislation, the American Bar Association supports the immediate preparation by the appropriate agency of the government and presentation to the Congress of suitable legislation to be operative both on a current and on a stand-by basis. The American Bar Association stands ready to assist both the Executive Branch and the Congress in formulating such legislation."

I. Conclusions

As a result of its study the Committee concludes:

a. Developments since the end of the Korean War require the drastic revision in our national mobilization policy. These revisions should be premised upon the approved mobilization assumptions that the nation maintain itself in a state of sustained mobilization readiness designed to:

(1) in the case of general war involving nuclear attack, emphasize those elements that will increase pre-war readiness and immediate conversion to a full war-time basis, and

(2) in the case of con' ict short of general war, emphasize those elements that will insure rapid acceleration of the mobilization conversion process.

b. Existing legislation is not adequate to support proper national mobilization policies, particularly in the area of general war involving a nuclear attack.

c. Current government practice of confining the implementation of national mobilization policies to the drafting of emergency legislation and the operational administrative control mechanisms flowing therefrom (such to be held in abeyance until the occurrence of aggression or armed conflict) does not adequately fulfill the requirements of national mobilization policy assumptions.

d. Additional steps in the form of preparation, presentation to the Congress and enactment of adequate legislation to implement current national mobilization policies on a current and stand-by basis is immediately necessary.

e. The work of preparation of the administrative control mechanisms necessary to support national mobilization policy and its implementing legislation should be accelerated and the resulting control systems should be submitted to the public as soon as possible, and

f. The Mobilization Committee of the Section of Administrative Law, to render effective and adequate service in the field of appraisement of national mobilization policies, should be permitted sufficient latitude to interpret broadly the primary interest of the Section in the procedural and operational aspects of administrative law rather than the substantive aspects of statutes under which administrative agencies operate. The Committee is not aware that such latitude would conflict with the work of any other Committee of the American Bar Association.

II. Current National Mobilization Policy

In studying the material which was available to the Committee in one form or another,[1] it is clear that changing modes of warfare and revised estimates of the capabilities of other countries should have had marked influence upon national mobilization planning.

World War II and Korean experience indicated the need for a

[1] The Committee wishes to note the dearth of unclassified material available to the public since the end of the Korean War in the area of determining what our national mobilization policies may be. The Office of Defense Mobilization and the Department of Defense, the agencies charged with the expression of national mobilization policy, have made available only the briefest policy statements. Examples are DMO VII-7 (Revised), DOD Directive 4005-13 and DOD Directive 4005.14. Speeches, newspaper reports and the like are still the chief source of public information available.

more or less time-phased, progressive conversion from a peacetime to a fully mobilized status. This conversion process principally commenced with the occurrence of clearly hostile actions, even though a defense program might have been accelerated in one form or another before the occurrence of such actions.

Current mobilization policies should reflect the realities of todays' conditions. To meet the outbreak of a general conflict commencing with nuclear attacks, national mobilization planning should stress immediate readiness *before* the occurrence of the event and immediate conversion to a full wartime status upon the occurrence. An acute telescoping of the time factor and the philosophy that "we fight with what we have" are the salient features of present mobilization thinking under conditions of a general war commencing with nuclear attacks. These conditions require the imposition of necessary controls in hours, whereas under former concepts, days and even months were allotted to a progressive transition.

In consonance with the concept of prewar readiness, mobilization policy should expressly recognize the eventuality of armed conflict short of a general nuclear war. Such conflict would be limited in scope, at least at the outset, and would not result in an instantaneous conversion to a full wartime status. Depending upon the circumstances existing at the time, the conversion process under this assumption could be rapid and extensive or it could be relatively slow and call for only a gradual imposition of controls. Limited conflicts, however, could suddenly erupt into general nuclear wars.

Published policy information expresses no preference as to which eventuality, the general war or the limited conflict, is most likely to occur. DMO VII-7 states that our general policy is to maintain a mobilization capability suitable for "immediate use or conversion in time of emergency."

The Committee believes that either premise requires that the work of creating the statutory framework for mobilization and the work of relating substantive legislation to the basic requirements of the administrative law process be done prior to the outbreak of any type of armed conflict. The Committee's views in this respect do not arise from any particular information concerning the present urgency of the world political situation. Rather they arise from the conviction that such work must be done currently or it will not be done adequately at all.

Obviously, in the event of a general war commencing with a nuclear attack and involving severe nuclear damage to the nation, whatever controls are at hand be they adequate or inadequate will be imposed at once without the niceties of relating such controls to the basic legislation that may be available or to the procedural and operational aspects of administrative law. The same would be true in the event of a nuclear attack during a conflict which had commenced as one limited in scope. The only difference would be that in the latter case, if sufficient time had elapsed to allow for the commencement of a time-phased transition, the shock would be lessened.

The fact that a general war with nuclear attack may not occur should not govern the state of legislative and administrative preparedness to meet the eventuality. The keystones of current military mobilization thinking in the nuclear age are "pre-attack readiness" and "post-attack concentration on a few necessary survival and victory areas." If these premises be true in the military mobilization area, they are equally true of the general government mobilization administrative framework.

III. Adequacy of Existing Statutes in the Administrative Law Area to Carry Out National Mobilization Policy

While it is clear that national mobilization policy for the nuclear age should stress pre-attack readiness and immediate conversion from a peacetime to a wartime basis, the statutory and administrative mechanisms through which such national policy is to be effectuated are either non-existent or do not measure up to the task imposed. Many of the enactments found necessary to accomplish mobilization in the World War II and Korean War periods have permanently lapsed.[1] Some are continued on a more or less piecemeal basis from year to year.[2] Others may be revived by Presidential or Congressional action upon the declaration of war or the proclamation of an emergency.[3] Those remaining are

[1] The Committee has examined some five hundred separate pieces of legislation that were in existence during World War II and Korea and which related to the mobilization of national resources during those periods. Over sixty percent of these have permanently lapsed or were specifically repealed.

[2] Certain parts of the War Powers Acts, the Defense Production Act, Defense Department Procurement Authorities, etc., are in this category.

[3] Legislation pertaining to the military establishment is replete with examples of special authorities which become operative only in time of war or national emergency. There are some one hundred and fifty of these enactments on the statute books applicable to the military establishment alone.

incomplete, scattered through various and sundry laws, and sometimes conflict in their assignment of responsibilities. In any event these enactments were designed primarily to effectuate mobilization policies for then existing conditions. They do not constitute a homogeneous body of legislation specifically constructed to implement current national mobilization assumptions.

It is impractical to present herein a detailed analysis of the adequacy of the mass of legislation that does survive. The subject matter ranges from the right to take over the Hoboken Manufacturer's Railroad Company to that of detailing armed forces personnel to the Veterans Administration. However, two examples concerning the adequacy of certain basic statutes are offered.

The Federal Civil Defense Act enacted in 1950 is based upon the philosophy of assigning this vital mobilization responsibility primarily to the several states. It became law eight years ago. In the meantime, the war making capabilities of foreign countries have radically changed. Neither the underlying policy of the statute for the pre-attack period nor the emergency powers granted a Civil Defense Administrator in time of threatened civil defense emergency under Title III thereof, are sufficient to cope adequately with current approved national estimates of the problem.

Similarly, in the field of industrial and economic mobilization, the Defense Production Act of 1950 was designed primarily to satisfy the exigencies of a Korean type conflict. It is not adequate particularly in the area of economic controls to serve the current requirement of pre-attack readiness and post-attack concentration on the few really vital areas necessary for survival and victory. The statute has been saddled since enactment with restrictive amendments. Although recently extended by Congress for another two years, its greatest virtue lies in the fact it is better than nothing at all.

The Committee is aware of the view that legislation in the area of implementation of mobilization policies is really not essential because, in the event of a general conflict initiated by widespread nuclear attack, conditions would require the imposition of something akin to national martial law. Even if it be conceded *arguendo* that the ultimate basis for mobilization in the event of a general war commencing with a nuclear attack is the "will of the commander," still that "will" requires considered administrative mechanisms of a legal nature through which to express itself.

Irrespective of the trigger used to place the machinery in motion, an adequate, considered administrative framework of actions to be taken is necessary. There is no greater fallacy in the area of mobilization preparedness than the assumption that a declaration of martial law creates a solution to the problems present in current mobilization policies. The pre-attack readiness concept is untouched by such action and the post-attack administrative processes are not created by the declaration.

IV. Current Government Actions in Carrying Out National Mobilization Policies

The Committee understands that the various agencies of the government concerned with the mobilization policy area have prepared drafts of standby legislation and the procedural and operational administrative processes necessary to effectuate national policies in the area. Check lists of emergency actions to be taken have been drawn up and detailed control systems devised. These presumably are ready for immediate presentation to the proper authorities, legislative and administrative, if the need arises. Current policy evidently precludes making either the substantive stand-by legislation or the operational and procedural implementation thereof available to the public at this time.

Preparation in draft form of the statutory and administrative mechanisms through which "telescoped" mobilization is to be accomplished is highly commendable and is a necessary first step toward implementation of our national mobilization assumptions. However, such action of itself neither meets fully the national mobilization policy requirement of pre-war readiness for a general war commencing with a nuclear attack nor conforms to the realities of conditions likely to exist following a nuclear attack.

Furthermore, this policy of preparing necessary legislation in draft form ready for presentation to Congress, and the appropriate operational and procedural implementation to administrative authority, immediately following the outbreak of general war precludes any rational public discussion of the adequacy or inadequacy of the content. Under almost any set of assumptions concerning conditions following a nuclear attack, it is unrealistic to believe that there could be any meaningful analysis of the measures proposed.

Statutory requirements for hearings and public notice, as con-

tained in such statutes as the Administrative Procedures Act, would perforce have to be totally abandoned. In fact, it is open to question that the Committee system of Congress could function in the aftermath of the pressures generated by a nuclear attack. The policy of preparing draft emergency legislation and procedural administrative controls, but not submitting these either to the legislature or the public until the eventuality occurs is neither necessary on the ground that secrecy is in the public interest nor on the ground the Congress and the public is unprepared to accept such presentation.

From the little that is publicly known concerning the substantive legislation and procedural implementation thereof in the form of control processes, the Committee believes that much has already been accomplished. Whether these are basically patterned upon World War II and Korean experience or represent new thinking to meet new mobilization assumptions, the Committee is in no position to judge, since they are not available.

Eight years have elapsed since Korea commenced and sixteen years since Pearl Harbor. In the meantime both concepts of warfare and the United States itself has changed considerably. Priorities and allocations systems, wage and price stabilization formulae, manpower distribution policies, transportation problems and the host of other areas that constitute the mobilization pattern cannot be devised upon the basis of picking up where we left off in 1950. The Committee believes that control systems based upon the experience of the past may prove inadequate or in view of the possibility of nuclear attack over-elaborate.

IV. Summary

From its review of the existence and adequacy of basic legislation and operational and procedural mechanisms in the field of mobilization, when related to current mobilization assumptions, the Committee concludes that there is an urgent need for a thorough and complete review of the area looking toward the early presentation to the Congress of adequate implementing legislation. Such legislation should provide existing statutory enactments to support the pre-attack readiness concept and the immediate conversion to a wartime status policy, as well as controls that might be necessary at the commencement of a limited conflict. Such should be followed by a presentation to the public of the

administrative operational implementation necessary in these areas. The Bar Associations should stand ready to assist government agencies in every way they can to complete this essential phase of national mobilization.

V. Scope of the Work of the Committee

The members of the Committee are aware that they have adopted in this report a broad interpretation of the Section's field of interest. To be useful and render service in the area requires this interpretation. Mobilization policy to meet a nuclear attack is far different from the experience of the past. Procedural and operational mechanisms to implement current policies are at this time inextricably intertwined with broader aspects of the problem. They are likely to remain so for some time to come. The Committee hopes that in its future operations it will be allowed a similar latitude.

FRANK X. BROWN, *Chairman*

REPORT OF THE COMMITTEE ON NATURAL RESOURCES AND INTERIOR AFFAIRS

Summary of Developments

The Committee's report this year is confined to two areas: (1) recent decisions of the Court of Appeals for the District of Columbia relating to the powers of the Secretary of the Interior under oil and gas leasing statutes, in which administrative regulations figure prominently; and (2) the new appeals procedure covering certain matters in the U. S. Forest Service (Department of Agriculture) as well as the availability of information covering the practices of that agency.

(1) *Department of the Interior*

In the past year the United States Court of Appeals for the District of Columbia Circuit rendered three split decisions dealing with the Secretary of the Interior's powers under the laws governing the leasing of oil and gas lands owned by the United States. *McKenna* v. *Seaton* (No. 14,095, decided March 20, 1958); *Seaton* v. *The Texas Company* (No. 13,636, decided October 3, 1957, on rehearing, May 8, 1958); *Barash* v. *Seaton* (No. 14,069, decided April 25, 1948). The first two hold that the applicant first in time should not be denied a lease where he satisfies the statutory requirements but, relying on departmental practice or advice, fails to fulfill certain regulatory requirements, while the third holds for such an applicant where the Secretary fails to follow his own regulations.

In the *McKenna* case, the first lease offer filed contained a showing that the applicant's federal oil and gas holdings did not exceed the maximum acreage permitted by the statute. But the first offeror failed to list his federal holdings as required by the regulations. Because such omissions had been regularly condoned by departmental practice for over three years, the Secretary allowed all lease applicants in the same position 30 days in which to cure the defect without loss of priority. Although three years after the first filing, the second applicant filed, conforming fully to the listing requirement of the regulations prior to the curing of the de-

fect by the first applicant. The Secretary rejected the second lease offer. The rejected applicant sued, relying on *McKay* v. *Wahlenmaier,* 226 F. 2d 35 (App. D. C., 1955), where one of the grounds for the Court's holding was that failure to satisfy the listing requirement disqualified the lease offeror from participating in a drawing from over 800 lease applications. In *McKenna,* the Court upheld the Secretary's action, distinguishing *Wahlenmaier* on the basis that in the context of the facts there presented, the failure to list federal holdings prevented disclosure of the applicant's connections with other applicants in the drawing for the same lease which revelation would have made the applicant ineligible. A vigorous dissent considered the equities involved did not justify a violation of a valid mandatory regulation.

In *The Texas Company* case, the first offeror properly applied for an oil and gas lease on 40 acres of public land. The responsible Government officer erroneously advised that the United States owned the minerals by acquisition rather than as a part of the public domain. Acting on this advice, the applicant asked that his offer be treated as one for acquired rather than public land. The second applicant in point of time filed a lease offer correct in all respects. An acquired-lands lease issued to the first applicant and a public-land lease issued to the second offeror. After it appeared that the minerals were part of the public lands, the acquired-lands lease was cancelled without notice. The holder of the cancelled lease brought suit.

The district court held that the first lease should be reinstated and the second one surrendered for cancellation. On appeal, the Court of Appeals concluded that the Secretary was without power to cancel administratively. Thus it affirmed the district court's judgment reinstating the first lease but reversed the holding that the second lease be cancelled. It took the view that oil and gas leases, like federal land patents, may be cancelled only by judicial proceedings. The decision left both leases outstanding. On rehearing, the Court withdrew its first opinion and held that, even if the Secretary had power to cancel administratively, he had improperly exercised it; that a court has greater latitude in review of Secretarial action where the contest is actually between private parties rather than between a party and the Secretary as "guardian of the people." Accordingly, the Court affirmed the district court's judgment requiring cancellation of the second lease and reinstatement of the first lease with procedural modifications. The dissent

found that the Secretary's action had a rational basis and should remain undisturbed.

The *Barash* case reaffirmed the principle that the Secretary is bound by his own regulations. The Secretary leased land at competitive sale after a non-competitive lease offer was filed. The question of whether the land was eligible for noncompetitive leasing at the time the lease offer was filed depended on whether the land was at that time within the known geologic structure of a producing oil or gas field. The non-competitive lease offeror claimed the regulations not only prescribed the method for determining that fact, but called for the filing of maps defining the structure lines with relation to the land, and that the practice had been to publish notice of the determination in the *Federal Register*—all of which had not been observed. The Court of Appeals held in favor of the noncompetitive lease offeror. The holder of the competitive lease was not before the Court. Indispensability of the absent lessee was raised but ruled against by the Court. The Court did not order the Secretary to cancel the outstanding lease in the absence of the lessee, but remanded the case for appropriate judgment to resolve this issue. A dissent in part considered that a portion of the acreage had been found to be within a known geologic structure.

It should be noted that in all three cases time in which petitions for writs of certiorari may be filed has not expired.

Rules Change

Attention is invited to amendments to the Rules of Practice of the Bureau of Land Management published in the Federal Register March 22, 1958. The amendments relate to the time and place for the filing of appeals both to the Director, BLM, and to the Secretary. Sec. 221.92 now provides for a 10 day period of grace in accepting filings if it appears that the document was probably transmitted before the end of the required period for filing. The changes resulted when it appeared that a large number of appellants were confused as to the place for filing, many appeals having been rejected when the necessary documents failed to arrive at the designated office within the period allowed.

(2) *United States Forest Service-Department of Agriculture*

This Committee in its last report reviewed briefly the land-management functions of the U. S. Forest Service, the availability of information with respect to the laws and programs under its

administration, and its rule-making and appeals procedures. Recommendations were made (1) that the Forest Service improve its informational activities with respect to national forest business decisions and matters relating to public use thereof; (2) that this Committee follow up the proposals of the Department of Agriculture to revise the Forest Service administrative appeals procedure; and (3) that final decisions on appeal be made available in usable form for guidance of interested parties.

Availability of Information

During the past year the Forest Service has continued a project of revising and bringing up to date its voluminous 7-volume Forest Service Manual which, to quote the Manual itself, "is designed as the primary medium for conveying to line, staff and facilitating personnel essential instructions as to laws, regulations and Service-wide standards of policy, procedure and practice governing Forest Service activity in all its fields of public service."

In its first report on the Forest Service, this Committee pointed out that the agency makes minimum use of the Federal Register, that copies of the Forest Service Manual are not available for public inspection in the Departmental libraries or public information office, and that no reference is found to it in the Code of Federal Regulations or Government Organization Manual. However, the Forest Service has expressed a desire in the Manual "to keep the general public informed as to the laws, regulations and operating policies that control Forest Service programs" and has cited the Manual "as one medium for making such information readily available" (FSM Vol. 1, Sec. C, GA-G2). Accordingly, distribution was authorized of selected titles to interested parties as well as periodical amendments upon request. This is a commendable step, and will enable the general public as well as the many classes of users and occupants of the national forests to be informed as to Forest Service policies. Some codification of this would be desirable through an amendment to the Secretary's regulations which should also point to the existence of the Manual as a compendium of Forest Service policies and procedures. There is still no published way in which an uninitiated but interested party can learn of the existence of the Manual, and yet the Manual contains much information of the type that agencies engaged in similar proprietary and land-management functions publish as a matter of course in the Federal Register.

Appeals Procedure

Subsequent to the Committee's last report, the Secretary of Agriculture substantially revised his regulations governing appeals from administrative decisions of Forest Service officials (F. R. Sept. 27, 1957, p. 1717; amended, F. R. Jan. 25, 1958, p. 449). The modified rules continue the prior-existing procedure to be followed by an aggrieved person in appealing "any administrative action or decision" of a Forest Service official. In addition, a new procedure is set up whereby a formal-type hearing is provided for an aggrieved party having or seeking a contractual relationship with the Forest Service involving use of occupancy of the national forests. While it is not spelled out entirely, these contractual relationships apparently embrace such matters as timber sales, grazing permits, recreational concessions and other special use occupancies, rights of way, etc., but do not include procurement or construction matters. On an appeal to the Chief Forester, a hearing examiner is assigned from the Department to compile a *de novo* record containing the testimony and evidence of the appellant and the Forest Service, which record goes to the Chief Forester for his final decision, which must be based on the record. The same record would be used if the case is further appealed, as it may be under the regulation, to the Secretary of Agriculture.

To date six cases have been docketed for hearing under the revised procedure. None has moved to final decision, and accordingly, comment upon the operation of the appeals procedure is somewhat premature. It should be noted, however, that a party having a procurement or construction-type contract with the Forest Service may have his dispute heard and finally determined by an impartial Departmental board established for that purpose. On the other hand, under the new appeals procedure use-and-occupancy contracts will be finally decided by the Chief Forester (unless the case is appealed to the Secretary) upon a record which is heard by someone else. We may observe that while the availability of a hearing under the new regulations is a significant advance this is cut somewhat by the fact that the hearing officer neither decides nor recommends a decision.

ROBERT L. MCCARTY, *Chairman*

REPORT OF THE NOMINATING COMMITTEE

Your Nominating Committee nominates the following members of the Section for the offices indicated to be filled by election at the Annual Meeting:

For Chairman, John B. Gage.
For Vice Chairman, Arnold Levy.
For Secretary, Elizabeth C. Smith.
For Section Delegate, John W. Cragun.
For the Council, Frederic P. Lee, Harold L. Russell, Albert E. Stephan, Kenneth Teasdale.

Discussion

Under Article III, Section 3 of the By-Laws, the offices of Chairman, Vice Chairman, and Secretary must be filled by an annual election. The office of Section Delegate is required to be filled by election for a two-year term each even numbered calendar year, which means that a member must be elected at the Annual Meeting in 1958. The terms of four members of the Council expire this year and, under the terms of Article III, Section 5, three of the members whose terms so expire are ineligible for re-election because they have served continuously as elected members for a period of three years. In the case of Mr. Kenneth Teasdale, he is now serving as an elected member for a two-year term which expires this year and, accordingly, he is eligible for re-election. The positions to be filled on the Council are for three-year terms.

Under Article III, Section 5, no person is eligible for nomination or election as an officer, Section Delegate, or a member of the Council unless he shall have been a member of the Section throughout the year in which the election is held. All of the nominees herein recommended by the Nominating Committee meet this requirement. Your Nominating Committee calls your attention to Article IV of the By-Laws, providing, in substantial effect, that this report shall be published in the Administrative Law Bulletin, or otherwise published to Section members prior to the Annual Meeting (Section 1). Further, Section 1 provides that, at the commencement of the first session of the Annual Meeting, the Section Chairman shall orally announce the Report

of the Nominating Committee, and, after a reasonable interval to be then announced by the Chairman, before the conclusion of that session, additional nominations for any specified position may be made from the floor. Seconds to such nominations shall not be permitted but the nominator must briefly identify the nominee and make a brief statement of his activities in the Section and in the law profession generally. Section 1 further requires the Chairman to announce the time and place when the election shall be held.

Section 2 of Article IV provides that all such elections must be held at the last session of the Annual Meeting. Elections for contested positions must be by written ballot unless otherwise ordered by unanimous consent of all members of the Section present. Further, each position to be filled by election must be voted upon separately and election shall be by majority of the votes cast. A run-off election must be held to choose between the two leading candidates if a majority vote is not initially obtained.

In accordance with Article IV, Section 1, there is set forth below a statement of the activities of each of the nominees, proposed by the Nominating Committee, in the Section and in the law profession generally.

John B. Gage

During the current year, Mr. Gage is serving the Section as Vice Chairman. Prior to this, he has served in the Section in various capacities, including membership on the Council, and as chairman of committees. He is engaged in general practice in Kansas City, Missouri, as a member of the firm of Gage, Hillix, Moore & Park.

Arnold Levy

During this year, Mr. Levy is serving the Section as Chairman of its National Committee. In the past, he has also served on other important committees of the Section. He is a member of the bars of New York and of the District of Columbia, and is engaged in general practice in Washington, D. C., as a member of the firm of Freedman & Levy. Prior to becoming engaged in general practice, he served as an attorney with the Securities and Exchange Commission, as General Counsel of the Coal Division, Department of the Interior, and as General Counsel, Coal Mine Administration, and as a special assistant to the Attorney General.

Elizabeth C. Smith

Miss Smith is currently serving as the Secretary of the Section, having served in such capacity since the 1956 Annual Meeting in Dallas, Texas. She has been a member of the Section for a number of years. She is a Hearing Examiner with the Federal Communications Commission. She is a member of the bar of Oklahoma.

John W. Cragun

Mr. Cragun is currently Section Delegate and, in the past, he has served the Section in numerous capacities as a member of the Council and as committee chairman. He is a member of the bars of Virginia and of the District of Columbia. He is engaged in general practice in Washington, D. C., with the firm of Wilkinson, Cragun and Barker.

Kenneth Teasdale

Mr. Teasdale is now serving the Section as a member of the Council, having been elected to this office at the 1956 Annual Meeting in Dallas. He is a member of the Missouri bar and is engaged in general practice in St. Louis with the firm of Cobbs, Armstrong, Teasdale and Roos.

Harold L. Russell

Mr. Russell is now serving as an ex-officio member of the Council of the Section in his capacity as last-retiring Chairman. He served as Chairman during 1956-57, and prior to that time he served the Section as Council member and as committee chairman. He is a member of the bars of Georgia and New York, and is now engaged in general practice in Atlanta, Georgia, with the firm of Gambrell, Harlan, Russell, Moye & Richardson.

Albert E. Stephan

Mr. Stephan is now serving the Section as Chairman of the Committee on Maritime Transportation. In the past, he has served as chairman of other Section committees. He is a member of the bars of Massachusetts, the District of Columbia, and Oregon. He is now engaged in general practice in Seattle, Washington, with the firm of Grosscup, Ambler, Stephan and Miller. He has

also served in the Government with the Interstate Commerce Commission, the Federal Communications Commission, and as a Special Assistant to the Senate Committee on Interstate Commerce.

Frederic P. Lee

Mr. Lee is now serving the Section as Chairman of its Committee on Agriculture. In the past, he has served on other Section committees. He is a member of the bars of New York, the District of Columbia, and Maryland. He is now engaged in general practice in Washington, D. C., with the firm of Lee, Toomey & Kent. He has served in the Government as Legislative Counsel in the House of Representatives and in the Senate, and as Special Counsel to the Secretary of Agriculture. He has also served as Member and General Counsel of the Federal Alcohol Control Administration.

Respectfully submitted,

ASHLEY SELLERS, *Chairman*
FREDERIC L. KIRGIS
BRYCE REA, JR.

REPORT OF THE COMMITTEE ON ORGANIZATION AND BY-LAWS

The major activity of the Committee on Organization and By-laws for the current year was submission of amendments to the Section By-laws to the House of Delegates for approval at the 1958 Mid-winter meeting, and, preparation of a statement giving the reasons for the amendments.

The amendments were approved by the House of Delegates on February 25, 1958. A complete, up-to-date copy of the Section By-laws was published in the Administrative Law Bulletin, Volume 10—Winter-Spring issue.

No further matters were referred to the committee for action this year.

LOUISA WILSON, *Chairman*

REPORT OF THE COMMITTEE ON PUBLIC CONTRACTS

For the past several years the Public Contracts Committee of the Administrative Law Section has been engaged in a study of various procedural problems arising primarily out of the Disputes Clause of Government Contracts. This clause permits Contracting Officers to make decisions on disputes involving questions of fact arising under the Contract and requires the Contractor to appeal from such decisions if he does not agree with them. These Appeals come before the Contract Appeals Board of the agency involved for decisions.

In the Report of the Committee for the year 1956-57 a summary of its activity for that year was given. This Report brings up to date the activity of the Committee during 1957-58, much of which was an extension and continuation of the projects already before the Committee.

The projects considered, their status and the action yet to be taken thereon are:

1. The matter of placing a limit upon the time Contracting Officers may take for making their decisions.

Its status: This matter is one on which negotiations must be carried on with various Department Heads in an attempt to reach an agreement.

2. The matter of requiring full and complete findings of fact to be made by Contracting Officers.

Its status: This matter also is to be negotiated with Department Heads, if possible.

3. The extent to which a Contracting Officer retains jurisdiction of a dispute after appeal is taken.

Status: This matter is under study by a Sub-Committee of the full Committee.

4. The matter of elimination of multiple appeals. This problem arises out of the Disputes Clause in Corps of Engineers Contracts for Military Construction, which obliges a Contractor who is dissatisfied with a decision of the Corps of Engineers Claims & Appeals Board to appeal further to the Armed Services Board of Contract Appeals before he may go to the Court of Claims. In

this way two or more appeals are required with greatly added expense to the Contractor. The Committee recommended that multiple appeals be abolished. The matter of implementing the recommendation was assigned to a Sub-Committee and is under consideration by them.

5. The next project involved the practice of Contract Appeals Boards, after the Board sustains the appeal, of remanding cases to the Contracting Officer for settlement, without adequate instructions. The Committee adopted a Motion that full instructions on remand be given the Contracting Officer. This matter is receiving study by a Sub-Committee.

6. The next problem dealt with the provision in the Disputes Clause of Corps of Engineers Contracts for Military Construction. It provides that appeal from its decision vacates the decision. This creates problems where the Engineers Board sustains the appeal as to some claims involved in the appeal and denies others. An appeal from such a decision, according to a very recent decision of the Armed Services Board of Contract Appeals, vacates the decision as to the allowed claims as well as the disallowed claims. This gives the Government an opportunity to try again the allowed claims before the Armed Services Board. After study of this situation, a Sub-Committee recommended generally, and the Committee adopted its recommendations, that the Disputes Clause provide that only the claims designated in the notice of appeal would be considered by the higher appeal board; that no other claims not noticed would be opened up for review. This report and recommendations were reviewed at a recent meeting and will be the subject for further steps by the Public Contracts Committee next year.

7. The next problem considered was whether the Appeals Boards should hear the case on liability and quantum at the same time. Generally, the practice has been for the Board to decide liability first, on the theory that if they deny the Appeal they have saved the time and expense of going into quantum; and, on the further ground that if they allow the appeal and remand the case to the Contracting Officer, settlement can usually be worked out. However, it is not always possible to work out a settlement. A Sub-Committee studying the problem recommended, among other things, that if both parties agree that the Board shall hear and decide both liability and quantum the Board shall do so and the Rules of the Boards be clarified to so provide. This report was also received at a late meeting and steps to implement it must be taken by the new Public Contracts Committee.

Other matters of business were handled by the Public Contracts Committee during the year but it would lengthen this report unnecessarily to cover them. Sufficient to say that the foregoing items represent the major activity of the Committee for the past year and the more important of its unfinished business.

BERNARD J. GALLAGHER, *Chairman*

REPORT OF THE COMMITTEE ON PUBLIC INFORMATION

The House Committee on Government Operations had found that 5 U.S.C. § 22—the "general housekeeping" authority to executive departments—has been "generally cited by the Government departments and agencies as the basis for withholding information from the Congress and the public." H. Rep. No. 2947, 84th Cong., 2d Sess., pp. 50-58 and Exhibit III. It has made similar findings with reference to Sec. 3 of the A.P.A. (5 U.S.C. § 1002). *Ibid.* pp. 53-58, 281-283. It recommended (*Id.* at 93):

> Congress should establish a uniform and universal rule on information practices. This rule should authorize and require full disclosure of information, except for specific exceptions defined by statute or restricted delegation of authority to withhold for an assigned reason within the scope of the authority delegated.

Proposed Amendments to 5 U.S.C. Sec. 22

Pursuant to that recommendation, the Moss Subcommittee on Government Information proposed an amendment to 5 U.S.C. § 22 to clarify its intent by specifying that "This section does not authorize withholding information from the public or limiting the availability of records to the public," in H.R. 2767 (Moss) which is identical to H.R. 2768 (Dawson), H.R. 2769 (Fascell) and H.R. 3467 (Multer) and S. 921 (Hennings), introduced in the 85th Congress, First Session. The bills were referred in the House to the Special Subcommittee on Government Information, Government Operations, and in the Senate to the Subcommittee on Constitutional Rights, Judiciary.

The proposed amendment to 5 U.S.C § 22 is consistent with Resolution 2.1 of the Special Committee on Legal Services and Procedure, adopted by the House of Delegates of the American Bar Association at the 1956 Midyear meeting, to "Provide more adequately and effective for public information on the administrative process." The Committee was, therefore, instrumental in obtaining John W. Cragun, Chairman of the Ad Hoc Committee on the Administrative Code, as a witness before both the House

and Senate Subcommittees. Before the Moss Subcommittee, Mr. Cragun said:

> To the extent that a statute such as title 5, United States Code, section 22, can be availed of by a worried administration to deny access to matters properly within the scope of the rulemaking and adjudication functions of an agency, and hence properly within reach of the public to the same extent as congressional or court proceedings would be, just to that extent is it essential that it be made plain that that act is not a shield for quite any matter that might embarrass the particular administrator. To the extent that these bills would bring about better public information . . . the American Bar Association . . . heartily endorses them.

Committee Print: "Availability of Information from Federal Departments and Agencies: Part 14—Second Hearing on Amendment of 'Housekeeping Statute' Revised Statutes 161 (5 U.S.C. 22)," Feb. 6 and 7, 1958, 85th Cong., 2d Sess., pp. 3352-3354. On April 16, 1958, the House by voice vote passed without amendment H.R. 2767, to amend section 161 with respect to the authority to withhold information and limit the availability of records. See 104 Daily Cong. Rec. 5682-5891.

The Senate Constitutional Rights Subcommittee held hearings with the Attorney General in March 1958 on S. 921 which is identical to the Moss Bill. The Attorney General admitted that this "housekeeping" statute should not be used as authority to withhold information. However he attempted to insert a new theory that when the first Congress adopted this statute they recognized a so-called "Executive Privilege" existing in Department Heads. On April 16, 1958 the subcommittee heard testimony from proponents of the amendment. Subsequently the subcommittee adopted a report on S. 921 without dissent or amendment. The Senate Judiciary Committee also adopted the report without amendment. S. 921 is awaiting Senate Floor action as of this date (June 20, '58).

Proposed Amendments to 5 U.S.C. Sec. 1002

Pursuant to the recommendations for a single "public records" provision, the Moss Subcommittee and its members have introduced bills amending Sec. 3 of the Administrative Procedure Act of 1946: H.R. 7172 (Dawson), H.R. 7173 (Fascell), H.R. 7174 (Moss), and the companion bill S. 2148 (Hennings), 85th Cong.,

1st Sess., currently pending before the respective Committees on the Judiciary. These bills do not differ significantly from the proposed revisions of that Section contained in the ABA's proposed Code of Administrative Procedure. The Bills, however, require (1) separate statements of rules relating to the availability of information; (2) the grant of the privilege to copy public records; (3) inclusion in the public record of "all applications, . . . requests, claims, communications, reports, or other papers and all records and action by the agency thereon"; including "every individual vote and official act of an agency." There are other minor differences between the Code and the Bills. The Bills omit any provision for "alternative methods of publication," which the Code provides, limiting reliance upon such information to persons who have had prior, reasonable and actual notice thereof, and the Code provision for an exemption for matters "submitted in confidence pursuant to statute or agency rule or direction."

There will be no action on the House Bills during this session of Congress because the Administrative Procedure Subcommittee of the House Judiciary Committee has failed to request comments from the Government Agencies. The same bill S. 2148 was referred for comment by the Senate Judiciary Committee to selected Government Agencies. The Attorney General did comment on this Bill when he testified in March 1958 before the Senate Constitutional Rights subcommittee. Your committee believes that no further action will be forthcoming during this session of Congress.

Other Bills Before Congress

Your committee is still considering S. 2462 introduced on July 2, 1957 by Senator Jackson (for himself, Mr. McClellan, and Mr. Yarborough) which is before Senate Judiciary. This Bill is "To prohibit certain communications with respect to adjudicatory matters pending before Government agencies." No action by the Congress is expected during this session of Congress.

In addition your committee desires to direct the attention of American Bar Association members to H.R. 12099 introduced by Congressman Moulder on April 22, 1958 and referred to the House Committee on Rules. This Bill is "To amend the Legislative Reorganization Act of 1946 to authorize the review of administrative regulations by committees of Congress prior to their promulgation and for other purposes." No action on this par-

ticular Bill is anticipated during this session of Congress but your committee feels that the mere fact such a Bill was introduced warrants it being called to the attention of the ABA membership.

A Rule-Making Case in Point

The Moss Subcommittee has provided your Committee information on an exchange of letters with the Bureau of Customs concerning the availability or rather non-availability of comments received in a public rule-making proceeding.

In the case at hand the Customs Bureau on October 4, 1957 published the following proposed regulation in the Federal Register inviting the filing of comments within a 30-day period:

> "Section 26, 7(a) is amended to read:
>
> "(a) Upon written application of any importer, the collector of customs shall refuse to permit any person, except as provided for in section 26.4, to copy the name of such importer from manifests."

The subsequent procedural events are indicated by a comparison of the following questions of the House Committee and the answers of the Bureau of Customs:

QUESTIONS

1. "Was this notice of proposed rule-making published in the Federal Reserve in accordance with the Administrative Procedure Act (5 U.S.C. 1001, et seq.)?

2. "Was the notice of the 30-day extension period for filing comments published in the Federal Register? If not, why not? Please give in detail the reasons for granting the 30-day extension.

3. "Were the comments concerning the proposed rule-making which were received available for public inspection; (a) as they were received, (b) at the expiration of the first 30-day period, (c) at the expiration of the 30-day extension period? If not, why not? Please cite specific statutory authority for withholding such comments, if they were withheld, and give reasons.

4. "What is the legal effect of any comments received after December 4, 1957? Can any comments received after the expiration date be recognized and have any legal effect?

5. "Are comments on proposed rule-making available for public inspection *before* a decision is made by the Bureau of Customs or Treasury Department? If not, why not? Please cite specific statutory authority and give reasons.

6. "Are comments on rule-making available for public inspection *after* a decision has been made by the Bureau of Customs or Treasury Department? If not, why not? Please cite specific statutory authority and give reasons."

ANSWERS

1. "The notice of proposed rule-making was published in the Federal Register in accordance with the Administrative Procedure Act. The publication occurred on October 5, 1957, at 22 Fed. Reg. 7942.

2. "No notice of extension of the period for filing comments was published in the Federal Register, since

the Bureau understood that it had fully satisfied by statutory requirements by the original publication. See 5 U.S.C. 1003(a). The extension was granted upon the request of interested persons who had urged that they required further time. Advice that the period had been extended was transmitted, either directly or indirectly, to them within the original period. Although notice of it was not published generally, the Bureau considered that the extension inured to the benefit of any person wishing to comment.

3. 5. and 6. "Comments received on notices of proposed rule-making have not been available for public inspection at any time. The Bureau has not understood that such inspection is required by statute. While the agency's rule is naturally open to public inspection, the materials upon which the agency acted in formulating the rule are not, as we view the law, required to be disclosed. See 5 U.S.C. 1002(b); 1003(b); (1946) S. Doc. 248, 79th Cong. 201. Any mandate that all comments should be open to public inspection would tend in many cases to limit the value of the comments submitted and defeat the important purpose served by having comments submitted.

4. "With respect to any comments received after December 4, 1957, the Bureau, whether or not bound to consider them, has in fact done so, just as it always gives consideration to comments by the public."

Your committee feels that the foregoing answers are not in accordance with the intent and purpose of the Administrative Procedure Act of 1946. In fact the Customs Bureau's interpretation seems to be in direct conflict with the intent of Congress as set forth on p. 198 of Senate Report No. 752, Legislative History of the APA which states: "The section (Sec. 3. Public Information) has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."

Your Committee Chairman was honored by the publication in the Columbia Law Review (vol. 58 page 199, Feb. 1958) of an article entitled "Government Secrecy In Theory and Practice: 'Rules and Regualtions' As An Antonomous Screen." This article was reprinted in the Congressional Record (pp. A3007-A3010) on March 28, 1958.

Conclusion

In conclusion your committee feels very strongly that all communications regardless of the source be made available for public inspection by government agencies in every rule-making and adjudicatory proceeding. It is believed that this is one method of somewhat curtailing "improper influence" which has been so well set forth by Congressional hearings during the past year.

JOHN MITCHELL, *Chairman*

REPORT OF THE COMMITTEE ON REPRESENTATION BEFORE AGENCIES

The Committee has had its victories and defeats during the past year. Some illustrations of both its gains and setbacks will be discussed briefly in this report.

Limitation of Fees

Preparatory toward implementing the resolution of the House of Delegates at its 1957 Midyear Meeting condemning arbitrary or unreasonable limitations on fees for legal service rendered before administrative agencies, the campaign to educate members of the bar and laymen regarding the dangers of such practice was continued. For example, the Chairman wrote an article on this subject entitled "The Loss of the Right to Representation by Counsel" for the Journal of the Bar Association of the District of Columbia (Vol. 24, p. 135, March 1958).

Four bills were drafted repealing statutory provisions which prescribed unreasonable or arbitrary limitations on attorney fees. After discussions with the Chairman of the National Committee, two of the proposed bills were sent to the section Council for its approval. One bill would repeal the Federal statutory provision which limits to $10 the fee for administrative services in veterans claims against the Government. The second proposed bill would repeal the limitation of 10 percent to 20 percent of the amount of the award or judgment which the administrator of the agency concerned or the Federal judge may authorize be paid the successful attorney as a fee under the Federal Tort Claims Act.

On May 23, 1958, a letter was sent to the Secretary of the Department of Health, Education and Welfare, asking that he review the regulation which fixes as $10 the maximum fee which may be charged for services performed in connection with any claim for old age and survivors insurance benefits before the Administrator of Social Security (42 U. S. C., sec. 406). While the rule provides for an administrative appeal, lawyers have complained that they have been awarded only $10 for services worth considerably more.

In reply to the letter to the Chairman the General Counsel of the Department in a letter dated July 2, 1958 stated as follows:

"The $10 maximum fee which under the regulation an attorney may charge without obtaining agency approval is not intended to

be a rigid maximum. It is expected that in any case where a larger amount is required to reasonably compensate for services to be rendered, the attorney will ask for authority to charge accordingly. It may be that the maximum fee which an attorney may charge without approval under the regulation is inadequate. As you know, the purpose of the regulation is to provide some control over fees and charges to be made in order to afford at least a measure of protection against unreasonable charges to claimants under the Social Security Act and who in most cases do not require the services of an agent or an attorney.

"It is my information that in all cases where attorneys render necessary and valuable service to claimants, it is not difficult to obtain authority to charge attorney's fees commensurate with the services rendered. However, it is our understanding that the Social Security Administration is aware of the criticisms which the American Bar Association and other groups of lawyers have leveled at the regulation, and that thought is being given to its revision. It will, I am sure, be carefully reviewed in the light of the questions which you and others have raised regarding it."

Admission of Counsel

In its report for 1957 (9 Ad. Law Bull. 257, 260-1), your Committee expressed the hope that approximately half of the administrative agencies would be persuaded to eliminate their requirement for an application by an attorney for admission to practice before the agency. The General Accounting Office, Federal Communications Commission, Civil Service Commission, Post Office Department, and the Subversive Activities Control Board have amended their regulations to adopt in substance the proposal advocated by the American Bar Association, which would make eligible to practice before the agency without compliance with formal procedures for admission any person who is a member in good standing of the bar of the Supreme Court of the United States or of the highest court of any State, Territory, or the District of Columbia, and who is not under any order of any court restricting him in the practice of law. The Patent Office and the Veterans Administration have declined to adopt the proposal. Some other agencies are considering it.[1]

[1] Annual Report of the Office of Administrative Procedure, Department of Justice, 1957, p. 4. The Veterans Administration rejected the proposal subsequent to the publication of the report.

Recognition of Counsel

The Committee in its report last year set forth the language of a proposed rule for the recognition of counsel by Federal agencies which was agreed to after conference with J. Smith Henley, Director, Office of Administrative Procedure, Department of Justice. Judge Henley stated informally to the Chairman of this Committee that in several instances, agencies considering other amendments to their rules governing practice of attorneys have adopted the proposed provision, and he predicted that by this process the problem of non-recognition of attorneys by Federal administrative agencies with respect to service of papers and decisions would be solved by 1961.

The Committee on Public Contracts, Administrative Law Section, Bar Association of the District of Columbia, is endeavoring to have this provision adopted by the Defense Department, in connection with findings of fact and decisions made by contracting officers under the disputes provision of the standard form of Government contracts.

The Committee is pleased to report two examples of agency cooperation. The Commanding General of a military establishment was informed that a Government truck driver was advised that a reprimand had been placed in his personnel file because he was told by his boss to pay a debt he owed the Credit Union, but instead of following this order, he first consulted an attorney. The Committee, acting on the request of the attorney for the Government employee, asked that the reprimand be removed from the files and that prompt steps be taken to prevent a repetition of what appeared to be an interference with the right to representation by counsel. The Committee was informed that both steps had been taken.

The second example was the action taken by the Office of the General Counsel, Department of Agriculture. The Committee requested that a sentence be deleted from Rural Electrification Bulletin 385-Draft-February 17, 1958, on the subject of two-way mobile telephone facilities. This sentence read as follows: "It is not necessary to have a lawyer fill out the forms, nor will loan funds be authorized for this purpose." The Committee was informed that the matter was taken up with the officials of the Rural Electrification Administration and the questioned sentence was deleted from the bulletin.

THEODORE H. HAAS, *Chairman*

REPORT OF THE COMMITTEE ON SECURITIES

Action Recommendations:

See Resolution I and Resolution II in the annex to this Report.

The principal project of the Committee during the year has been to review and take a position on various bills supported by the Securities and Exchange Commission which were introduced in the first session of the 85th Congress. These bills would effect important changes in most of the Acts administered by the Commission. Under date of November 27, 1957 copies of such bills, the Commission memoranda supporting them, and a memorandum from the Chairman of this Committee highlighting provisions which appeared to present questions of administrative procedure were sent to all members of the Committee with a request for submission of their comments.

On January 24, 1958 a memorandum was circulated summarizing the views received from Committee members and adding comments of the Chairman where deemed appropriate. Each member of the Committee was requested to submit a statement of his position on each of the legislative provisions discussed in the memorandum.

In the light of the comments received, the recommendations appearing in the annex to this report have been developed. Such recommendations and the accompanying supporting statement are a part of this report and, as such, have the approval of the Committee. The recommendations do not reflect all of the questions or criticisms submitted by Committee members with respect to the Commission's legislative program. Comments were received regarding several aspects of such proposals which were primarily substantive rather than procedural. Since such matters are the concern of the Committee on Federal Regulation of Securities of the Section of Corporation, Banking and Business Law, they are not dealt with in this report, but members' substantive comments have been forwarded to that Committee for such action as it may deem appropriate. Secondly, within the administrative procedure field, the recommended resolutions have been limited

to those matters deemed of sufficient general concern to justify seeking Section and Association action.

Apart from the matters dealt with in the annex, the Committee is opposed to amendments which would remove or greatly extend existing statutory time limits within which the Commission must complete administrative action. Such proposals include:

(1) Amendment of the Securities Exchange Act of 1934 (Section 6(e)) to give the Commission an unlimited time (rather than the present 30 days) within which to act on an application for registration of a securities exchange;

(2) Amendment of the same Act (Section 15(b)) to permit the Commission pending determination of denial proceedings on an application for a broker-dealer registration to postpone, without notice or hearing, the effective date of such application (normally 30 days after filing) for an additional 90 days (the present time limit on such postponement is 15 days, and any further postponement must be after notice and hearing and a finding that it is in the public interest or for the protection of investors); and

(3) A similar amendment of the Investment Advisers Act (Section 203(e)) under which the commencement of a proceeding to deny registration would automatically postpone effectiveness up to 90 days (at present commencement of a denial proceeding does not postpone the effective date unless the Commission finds postponement to be necessary in the public interest and so orders, with a three month limit on postponement).

The Committee also opposes proposed amendments of the Securities Act of 1933 (Section 20(b)) and the Securities Exchange Act of 1934 (Section 21(e)) which provide that, in an enforcement action brought by the Commission, the Court "shall" issue an injunctive order on the basis of specified past misconduct. While the "shall" terminology is now in such Acts, the Commission's amendment would extend its application to past violations of the Acts or regulations thereunder. Such language can be read to compel entry of an injunctive order irrespective of whether repetition of such conduct appears likely. Such a result would be contrary to established principles of equity.

Finally, considerable concern has been expressed by members of the Committee with respect to the current regulations of the Commission governing suspension of the Regulation A exemption for offerings of securities within the $300,000 limitation of Section 3(b) of the Securities Act of 1933. The Commission's Rule

223 under that Act permits it, at any time after the filing of a Regulation A notification, to enter an ex parte order temporarily suspending the exemption. If no hearing is requested within 30 days and none is ordered by the Commission, the suspension order becomes permanent. The Committee is of the view that Rule 223, insofar as it permits suspension of a Regulation A exemption without notice or opportunity to comply and without a finding by the Commission that the offering circular contains wilfully false or misleading statements or that the offering will prejudice the public interest, is in conflict with the requirements of Section 9 of the Administrative Procedure Act (5 U.S.C. § 1008) governing revocation of licenses. The Committee proposes no action at this time on this matter. However, it notes that adoption of Section 1008(c) of the proposed American Bar Association Code of Federal Administrative Procedure would clearly require a change in the Commission's practice under Rule 223.

Of the 15 members of the Committee, 14 have approved this report and one (Mr. Meeker) has requested that he be recorded as not participating.

C. ROGER NELSON, *Chairman*

ANNEX TO REPORT OF SECURITIES COMMITTEE

RECOMMENDATIONS

I. *Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

WHEREAS, The American Bar Association supports the principle recognized by the Supreme Court of the United States in *Jones v. Securities and Exchange Commission,* 298 U.S. 1 (1936) that an applicant before an administrative agency should be permitted to withdraw his application unless it clearly appears that the interests of others will be injured thereby; and

WHEREAS, The Association considers that whenever an agency proposes to prohibit or restrain such a withdrawal it should promptly issue a formal statement in writing of its reasons for believing withdrawal to be contrary to the public interest;

Now Therefore, This Association authorizes and directs the Section of Administrative Law by all necessary and appropriate means, including appearance before Committees of Congress:

(1) To oppose legislation which would grant the Securities and Exchange Commission substantially unrestricted authority to prohibit withdrawal of a registration statement filed under the Securi-

ties Act of 1933 and to prohibit withdrawal of applications for registration as a broker-dealer or investment adviser, respectively, under the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 after the Commission has instituted proceedings to deny such applications and, in particular, to oppose H.R. 9326, 9327, and 9330, and S. 2544, 2545, and 2546, 85th Congress, 1st Session, and any successors thereto, insofar as they would grant the Commission such authority.

(2) To support:

a. Amendment of Section 6(c) of the Securities Act of 1933, as amended (15 U.S.C. § 77f(c)), by adding at the end thereof a paragraph substantially as follows:

"Provided no sale has been made, a registration statement or any amendment or exhibit thereto which has not become effective under Section 8 may be withdrawn upon application (1) at any time before the Commission has issued notice of an examination or proceeding pursuant to Section 8, and (2) after issuance of such notice unless the Commission, within ten days after an application for withdrawal is filed, determines that withdrawal would be contrary to the public interest or the protection of investors and issues an order prohibiting withdrawal which contains or is accompanied by findings in support of such determination. If a registration statement or any amendment or exhibit thereto has become effective, the Commission upon application may permit withdrawal of such statement, amendment or exhibit if the Commission finds that such withdrawal is consistent with the public interest and the protection of investors. Every application for withdrawal under this section shall be in such form as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."

b. Amendment of Section 15(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78o(b)), by inserting after the first paragraph thereof a paragraph substantially as follows:

"An application for registration under this section may be withdrawn upon application at any time before such registration becomes effective unless the Commission, within ten days after an application for withdrawal is filed, determines that withdrawal would be contrary to the public interest or the protection of investors and issues an order prohibiting withdrawal which contains or is accompanied by findings in support of such determination. The application for withdrawal shall be in such form as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."

c. Amendment of Section 203 of the Investment Advisers Act of 1940, as amended (15 U.S.C. § 80b-3) by relettering subsections (d), (e), (f), and (g) as (e), (f), (g), and (h) and inserting a new subsection (d) substantially as follows:

"(d) An application for registration under this section may be withdrawn upon application at any time before such registration becomes effective unless the Commission, within ten days after an application for withdrawal is filed, determines that withdrawal would be contrary to the public interest or the protection of investors and issues an order prohibiting withdrawal which contains or is accompanied by findings in support of such determination. The application for withdrawal shall be in such form as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."

II. *Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

WHEREAS, The American Bar Association is opposed to extension of the authority of administrative agencies to take action without notice or hearing which affects the rights and interests of persons subject to their jurisdiction,

WHEREAS, Two bills introduced in the 85th Congress, 1st Session —S. 2544 and H.R. 9326—would amend Section 8(b) of the Securities Act of 1933 to grant the Securities and Exchange Commission authority without prior notice or hearing to postpone the effective date of registration statements filed under the Securities Act of 1933 and two further bills—S. 2547 and H.R. 9328—would amend the Trust Indenture Act of 1939 to give the Commission similar authority under that Act,

Now Therefore, This Association records its opposition to such amendments and authorizes and directs the Section of Administrative Law to take necessary and appropriate action, including appearance before Committees of Congress, to oppose such bills and any successors thereto insofar as they would grant the Commission such authority.

Supporting Statement

Resolution—I

The Securities Act of 1933 (15 U.S.C. § 77a) ("1933 Act") prescribes the procedure for filing registration statements covering securities, and the Securities Exchange Act of 1934 (15 U.S.C. § 78a) ("1934 Act") and the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1) ("1940 Act") govern the filing of applications for registration as a broker-

dealer and an investment adviser, respectively. Except as otherwise provided in such Acts, the effective date of a registration statement filed under the 1933 Act is the 20th day after filing and the effective date of applications for registration under the 1934 and 1940 Acts is the 30th day after filing. None of these Acts, however, contains provisions governing the withdrawal of applications before they become effective.

Bills were introduced in the first session of the 85th Congress to grant the Commission essentially unlimited authority to prevent the withdrawal of registration statements filed under the 1933 Act and to prevent withdrawal of applications for registration filed under the other two Acts where the Commission has begun proceedings to deny such applications. Section 3 of S. 2544 (and section 4 of companion bill H.R. 9326) would amend Section 6(c) of the 1933 Act to prohibit withdrawal of a registration statement if a proceeding or examination pursuant to Section 8 of that Act (looking toward an order refusing effectiveness under Section 8(b) or a "stop order" suspending effectiveness under section 8(d)) is pending when the application for withdrawal is filed or is commenced within fifteen days thereafter, or if at the time the application is filed the registration statement is subject to an order refusing to permit such statement to become effective or suspending its effectiveness; withdrawal would also be prohibited if any securities as to which the registration statement has become effective have been sold. Section 14 of S. 2545 (and of companion bill H.R. 9327) would permit withdrawal of an application for registration as a broker-dealer under the 1934 Act only upon consent of the Commission if withdrawal is requested after the Commission has started a proceeding to deny registration. Section 5 of S. 2546 (and of companion bill H.R. 9330) would permit withdrawal of an investment adviser's application for registration under the 1940 Act only upon Commission consent if the request to withdraw is made after the Commission has commenced a denial proceeding.

The question of when applications filed with agencies such as the Commission may be withdrawn sometimes presents problems of competing interests of the applicant and the public. Once a registration statement or application has become effective the probability is much greater that interests of investors or the general public will have intervened which would make it inappropriate to permit unconditional withdrawal. However, it seems evident that when a registration statement under the 1933 Act or applications for registration under the 1934 and 1940 Acts have not become effective, withdrawal should be permitted unless it is clear that injury to investors or the public will result. The controlling doctrine was declared in the leading case of

Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936). As the majority opinion put it (22):

> "The question under the regulation [*] is whether due regard to the public interest and the protection of investors requires that the withdrawal be denied. The test is the absence or presence of prejudice to the public or investors; and, plainly enough, under the decisions of this court, the doctrine that a dismissal must be granted if no prejudice be shown beyond the prospect of another suit, *unless there be a specific rule of Court to the contrary,* is applicable, and the withdrawal should have been allowed as of course." (Court's emphasis)

In the *Jones* case no securities had been sold, the registration statement had not become effective and "there were no investors, existing or potential to be affected." The Court concluded (23):

> "Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned."

The lower courts have not extended the ruling of the *Jones* case in such a way as unduly to hamper the Commission in its administration of the Securities Act of 1933. Thus the Commission has been upheld in barring withdrawal after a registration statement became effective, *Oklahoma-Texas Trust v. S.E.C.,* 100 F. 2d 88 (10th Cir. 1934); *Resources Corporation International v. S.E.C.,* 103 F. 2d 929 (D.C. Cir. 1939); *S.E.C. v. Hoover,* 25 F. Supp. 484 (N.D. Ill. 1938). (In the latter two cases, no securities subject to the registration statement had been issued, but other securities of the same class were outstanding.)

The above bills supported by the Commission would repeal the rule of the *Jones* case. They would give the Commission substantially unlimited authority to prevent withdrawal of a registration statement filed under the 1933 Act and withdrawal of applications for registration filed under the other two Acts if denial proceedings had begun.

It is considered that the arguments which have been advanced for granting the Commission such new and unrestricted authority are not persuasive and are outweighed by the essential equity of permitting an applicant to withdraw his application provided the interests of others will not be prejudiced thereby. The considerations involved are briefly discussed below:

1. In its 23d Annual Report for the fiscal year ended June 30, 1957, the Commission states (p. 11) that the proposed amendment to the 1933 Act would "make explicit that a registrant may with-

* Commission rule governing withdrawal of a registration statement (now Rule 477).

draw his registration statement except where the statement is subject to a stop order or a stop order proceeding." This statement does not adequately indicate what the Amendment would do. Its basic objective is not to make "explicit" the right of a registrant to withdraw, but rather to make clear that the Commission would have substantially unrestricted authority to prevent withdrawal. Nor is it correct to say that the amendment would permit withdrawal except where the statement is subject to a stop order or stop order proceeding since (1) any pending examination, proceeding or order under Section 8 (including an ex parte order postponing effectiveness under another amendment supported by the Commission (see II below)) would prevent withdrawal, and (2) even if no examination or proceeding under Section 8 should be pending, the Commission could prevent withdrawal simply by initiating such an examination or proceeding within 15 days after the filing of the application for withdrawal.

2. In a July 1957 statment supporting the proposed changes in the 1933 Act, the Commission said that:

"One purpose of the proposed amendment is to prevent unscrupulous persons from filing a false or misleading registration statement with the Commission and then withdrawing it when the Comission institutes or deems it necessary to institute proceedings to ascertain and disclose the false or misleading character of the statement, and to prevent such withdrawal after the Commission has issued an order under subsection (b) or (d) unless the statement is first amended to make adequate disclosure of the facts involved."

This statement, also, fails to disclose the full sweep of the proposed amendment, including the proposed grant of power retroactively to prevent withdrawal. Further, it begs the question in assuming as false or misleading every registration statement as to which the Commission may institute proceedings to "ascertain and disclose" such falseness or misleading. The possibility that the Staff might upon investigation and hearing develop deficiencies in a registration statement does not require the conclusion that withdrawal of such a statement should not be permitted. Granting that a statement might ultimately be found false or misleading in some respect, its withdrawal should nevertheless be permitted unless there is substantial reason to believe that harm will thereby clearly be caused to investors or the public. It is believed that in the ordinary case the interest of the applicant in being permitted to withdraw its application and avoid the expenditure of time and money in resisting stop order proceedings will outweigh the possible public interest in information which the Commission might turn up in such an investigation. In any event, it seems clear that

the Commission should at least be required to show promptly that it has substantial grounds for believing that its investigation will produce evidence so important that withdrawal prior to publication of such evidence would adversely affect the interest of investors or the public (see item 7 below).

3. The heavy workload of its Staff is a continuing concern of the Commission. It is suggested that the public interest would best be served by concentrating the Staff's energies on obtaining adequate disclosure with respect to issues that are to reach the market, rather than on ferreting out possible inadequacies in a statement which the registrant wants to withdraw and in which the public is likely to have limited interest if any.

4. The Commission has a proper interest in discouraging unscrupulous persons from filing false or misleading registration statements, but the remedy should be adjusted to the evil. Further, the Commission is not now powerless to deal with wilful abuse of its processes. Section 24 of the Securities Act makes it a criminal offense for any person wilfully in a registration statement to make an untrue statement of a material fact or omit a material fact required to be stated or necessary to make the statements therein not misleading. The plain reading of this section indicates that the offense is committed when a wilfully false registration statement is filed, so that withdrawal would not appear to be a defense.

5. There may be exceptional situations in which, even though a registration statement has not become effective and no securities covered by it have been sold, it could reasonably be concluded that withdrawal would prejudice the interests of investors. The Commission has barred withdrawal of such registration statements, for example, where the registrant already has a substantial number of shares of the same class outstanding and it considers that such stockholders are entitled to have the information which would be developed in a stop order proceeding, see *Columbia General Investment Corporation,* Securities Act Rel. No. 3901 (March 5, 1958). That case demonstrates that the Commission is already exercising authority to restrain withdrawal of pre-effective statements which it considers would injure the interests of investors. Thus no reason appears for granting it an absolute authority which goes beyond the need for protecting the public interest.

6. The need appears to be, rather, for establishment of statutory conditions and standards for the exercise of Commission control over withdrawal of statements before they become effective. The Commission has shown, in at least one reported instance, a tendency to push its authority beyond reasonable limits. In a recent

case, *Comico Corp.*, Securities Act Rel. No. 3863 (December 17, 1957) the Commission (Sargent, C. dissenting) ruled that, although registrant had applied to withdraw its registration statement before stop order proceedings were instituted, before effectiveness of the registration statement, and before any securities thereunder were issued, nevertheless withdrawal should be denied. Registrant had no securities in the hands of the public. Its officers and directors held stock of registrant which had been acquired by use of funds borrowed from another company in which they were also officers and promoters. Such other company, as a result of such transaction, had an option to acquire the bulk of such stock of registrant. The majority of the Commission held that it was in the public interest that findings with respect to the stop order proceedings be made available to the stockholders of the second company "in connection with their determination as to whether or not they should take any action with respect to the option." Commissioner Sargent was unable to find a "reasonable or material basis" for distinguishing the *Jones* case and observed that the shareholders of the second company were "only collaterally concerned with the matters dealt with in the Comico registration statement and their interest is too attenuated to warrant treating it as a basis for withholding the withdrawal requested."

7. The accompanying resolution proposes an amendment of Section 6(c) of the 1933 Act which would recognize that normally a registrant should be free to withdraw a registration statement before effectiveness. It would provide that, if no sale of a security has been made, a registration statement which has not become effective can be withdrawn without limitation before the Commission issues a notice that an examination or proceeding under Section 8 (looking to a refusal or stop order) has been initiated, and can be withdrawn after issuance of such a notice, unless the Commission shortly thereafter issues an order prohibiting withdrawal which includes or is accompanied by Commission findings in support of its determination that withdrawal would be contrary to the public interest or the protection of investors. If an application for withdrawal of a registration statement is filed before effectiveness, before sale of any securities thereunder, and before the Commission has begun an examination or proceeding under Section 8, the registration statement is in such preliminary and tentative status that the interest of the registrant in withdrawing it should be given precedence over any potential interest of investors or the public in compelling registrant to remain subject to Commission jurisdiction. If an examination or proceeding under Section 8 has begun, the Commission should nevertheless be required to indicate promptly why it considers that the inter-

ests of investors or the public will be prejudiced by withdrawal. If the Commission considers the situation serious enough to warrant prohibiting withdrawal it should be able to set forth readily a justification of its position. Further, requiring the Commission so to state its position would provide protection against arbitrary action and afford the registrant a basis for determining whether to seek Court review. The proposed amendment would also recognize that, even after a registration statement is effective, the Commission in its discretion may permit withdrawal if it finds withdrawal to be consistent with the public interest and the protection of investors.

8. The proposed commission amendments to the 1934 and 1940 Acts do not go as far as the proposed change in the 1933 Act, in that an applicant for registration is free to withdraw any time prior to institution of denial proceedings by the Commission. Nevertheless, it is believed that these amendments too would give the Commission unwarranted authority. Whenever the Commission should wish to forestall withdrawal, it could do so simply by initiating denial proceedings.

9. Although applications for registration as a broker-dealer or investment adviser become matters of public record, investors and the public generally are not expected to take any action or change their position on the basis of such applications. They are requests for authorization to engage in certain lines of activity, and until they become effective do not concern the investing public. Thus it is difficult to see any element of justifiable public reliance which would warrant restricting the right to withdraw such applications before effectiveness.

10. Further, the fact that the Commission has found grounds to institute proceedings to deny registration does not necessarily amount to a justification for prohibiting the applicant from withdrawing his application. The 1934 Act and the 1940 Act set forth varying kinds and degrees of disqualifying conduct, and it cannot be determined in advance that the possibility of denial on one or more such grounds would justify prohibiting withdrawal of the application. For example, it is not at all clear that because an applicant (or any person deemed to be controlling or controlled by him) has at some time in the past wilfully violated a rule of the Commission under the 1934 Act and on that ground could be denied registration, applicant should therefore not be permitted to withdraw his application. It is questionable whether the public interest will be served by permitting the Commission to bar withdrawal so that it can pursue denial proceedings which will have substantially the same practical results as withdrawal.

11. The Commission has argued that, if an applicant is permitted to withdraw after a denial proceeding is begun, the Commission may be in a position where it will be unable to prove disqualification later should the applicant apply again. But it is far from clear that the Commisson should be given power to bar withdrawal so that it can put itself in a better position to deny an application which may or may not be filed at some future date. The Supreme Court rejected such an argument with respect to the registration statement involved in the *Jones* case (see 298 U.S. at 22).

12. Here again it should be kept in mind that the Commission need not resort to absolute authority to ban withdrawal of applications to cope with wilful abuse of Commission processes. Under Section 32(a) of the 1934 Act and Section 207 of the 1940 Act any person who wilfully makes any untrue statement of a material fact in any application or report filed under such Act is, upon conviction, subject to criminal penalties.

13. It is considered that the 1934 Act and the 1940 Act as well as the 1933 Act should include a provision establishing standards governing withdrawal of applications for registration. The amendments to these Acts contained in the accompanying resolution would require the Commission promptly to state its grounds for denying an application for withdrawal. Such a provision would protect any ultimate interest which the Commission and the public may have in preventing a withdrawal and would provide protection against arbitrary action.

Resolution—II

Under Section 8(b) of the 1933 Act, if it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may after giving notice within ten days after the filing of the statement and opportunity for hearing within ten days after the notice, issue an order before the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. Section 4 of S. 2544 (and section 5 of companion bill H.R. 9326) would amend Section 8(b) to permit the Commission, prior to the effective date, to issue an ex parte order (a) postponing the effective date pending a hearing and (b) giving the registrant an opportunity for a hearing within fifteen days from the date of such order; after such hearing the Commission may refuse to permit the statement to become effective if it finds it materially incomplete or inaccurate.

In its July 1957 statement supporting the proposed amendment, the Commission observes that because of the short period of time now

provided in subsection (b) for notice and hearing, the subsection is almost never invoked by the Commission, that the proposed amendment would provide "a more workable administrative procedure" in stop order cases where the registration statement has not become effective, and that it would make subsection (b) "more flexible" by providing more time within which proceedings may be held and by enabling the Commission to issue an order "postponing" the effective date "pending the completion of proceedings."

Section 3 of S. 2547 (and of companion bill H.R. 9328) would amend Section 305(b) of the Trust Indenture Act of 1939 to conform to the proposed amendment of Section 8(b) of the 1933 Act. Under present Section 305(b), the Commission may issue an order refusing to permit a registration statement to become effective upon findings of non-compliance with the Trust Indenture Act only if the order issues after notice and opportunity for hearing within the periods and in the manner required with respect to refusal orders under Section 8(b) of the 1933 Act (*i.e.* notice within 10 days after filing and hearing within 10 days after the notice). Under the amendment, if the Commission prior to the effective date of the registration statement covering the indenture securities finds non-compliance with the Trust Indenture Act it shall, after notice and opportunity for hearing within 15 days after such notice, issue an order refusing effectiveness. In addition, the Commission may order the effective date postponed pending such hearing.

1. There is objection in principle to these extensions of the Commission's power to act without notice and opportunity for hearing. Under these proposals the Commission could wait until one day before a registration statement was to become effective, then issue an ex parte order "postponing" effectiveness. The timing of an offering is very often of vital importance to its success and postponement of the offering date could ruin the issue. In such cases, unlimited authority to postpone the effective date without prior notice would give the Commission substantially the power to determine whether or not the issue will reach the market. Thus it would have a powerful weapon with which to compel changes in the registration statement not clearly required by the Act. Further, the existence of such ex parte authority could well encourage the Commission Staff, in some cases, to bring about Commission postponement rather than put forth the effort needed to complete a letter of comment in time to enable the registrant to meet objections and complete registration.

2. The proposed amendment of the Trust Indenture Act is especially objectionable in that it would appear to permit the Commission by ex parte order to "postpone" effectiveness indefinitely. Unlike the proposed amendment to the 1933 Act, this amendment would not require that the order "postponing" effectiveness also set a date for

hearing within a specified time. The Commission could issue a suspension order at any time before effectiveness and, at such later time as it chose, issue an order for hearing on the question of refusal. Meanwhile, the issue would be held up by ex parte action until after a Commission decision following hearings on refusal. This would put a registrant anxious to reach the market at the mercy of the Commission whenever a question of Trust Indenture Act deficiencies were presented.

3. It may be, as the Commission states, that it is not possible under present Section 8(b) of the 1933 Act to hold a hearing upon notice and issue an order refusing effectiveness before expiration of the twenty day waiting period. But the Commission is not powerless to prevent effectiveness when it has substantial reason to believe that a registration statement is materially false or misleading. As a practical matter, in most cases where the Commission initiates an investigation under Sections 8(e) or 20(a) of the Act with a view to a possible stop order, the registrant will agree to file one or more delaying amendments to postpone effectiveness. If necessary, under Section 8(d) the Commission can, any time after a registration statement is filed, issue notice of a hearing within fifteen days to determine whether a stop order suspending effectiveness should be issued. Such a notice of hearing prior to the effective date of a registration statement looking toward the issuance of a stop order is in the nature of a temporary restraining order (see *Jones v. S.E.C., supra* at 15-18). That being so, it is difficult to see why the Commission should be given the additional authority it seeks. In the usual case, issuance of a letter of comment will serve to bring about the changes in a registration statement which should be made before it becomes effective. If the Commission finds that a materially false or misleading registration statement is about to become effective, then it can invoke the stop order procedure of Section 8(d).

4. Since it appears that the Commission does not need authority to suspend the effectiveness of registration statements by ex parte action beyond that which it already has in initiating stop order proceedings, the accompanying resolution would authorize opposition to any change in Section 8(b) of the 1933 Act and Section 305(b) of the Trust Indenture Act.

REPORT OF THE COMMITTEE ON STATE ADMINISTRATIVE LAW

A substantial part of the activities of the State Administrative Law Committee during the year now ending has related to "housekeeping" functions. Permanent, official Committee files have been created whereas none, apparently, have heretofore existed. In addition to normal correspondence files, the Committee has now created data files relating primarily to the problems of state administrative procedure. For example, we have separate files, for which the data has been collected during this year, as follows:

1. A file of Law Review articles dealing with the subject of state administrative law.
2. A file of data relating to the Model State Administrative Procedure Act.
3. A file of Administrative Law Bulletin data relating to state administrative procedure.
4. Separate files relating to the status, if any, of state administrative procedure legislation, either enacted or proposed, and the problems attendant thereto in the District of Columbia and many of the individual states, although not all states are yet included.

Effort has also been made to ascertain those states in which there are currently active programs looking toward the consideration and possible enactment of state administrative procedure legislation. In the States of Arizona, Illinois, New Jersey and Washington definite activity is existent or has been existent during the year. In several of those states the Committee has been, we hope, of some help in providing information and in putting interested lawyers in touch with each other for an exchange of information and ideas among themselves.

It is the belief of this Committee that state government and state regulatory functions have and will increase in complexity and that, although they perhaps never will rival the functions of the Federal Government, state functions will at least approach in complexity those of the Federal Government. It being the further belief of this Committee that the average lawyer has more and more concern with the state administrative function, it seems apparent that this Committee faces a challenge in its efforts to

assist and perhaps even to stimulate those who are or should be concerned with the betterment of administrative practices and procedures in the various states. This challenge is deemed to be even greater by reason of the confusion and lack of uniformity which exists in this field in many states.

It is the sincere hope and desire of the Committee that it may be able to expand its data files of useful information and, with those materials as a base, assist and stimulate more actively in the effort to achieve proper and uniform, within any given jurisdiction, application of the accepted and sound principles of administrative procedure.

In the furtherance of these objectives it is anticipated that some organizational adjustments within the Committee may be necessary, but no recommendations in that regard are presently formulated.

FREDERIC L. KIRGIS, *Chairman*

REPORT OF THE COMMITTEE ON STATE DEPARTMENT MATTERS

The State Department Matters Committee has five standing subcommittees, dealing respectively with:

1. Passports and Related Matters
2. Reciprocal Trade Agreements
3. International Transportation
4. International Communications
5. Restrictions on Information

Passports and Related Matters. The general position of the Committee and of the American Bar Association with respect to the passport review procedure of the State Department was set forth in a statement on H.R. 9991, 84th Congress, 2nd Session, which appeared at pages 30-32 of the hearings before Subcommittee No. 1 of the House Judiciary Committee on May 10 and 28, 1956. Nothing has transpired since that would indicate any basis for revising the general principles incorporated in that statement.

Reciprocal Trade Agreements, International Transportation and International Communications. In the last two decades, the State Department has assumed increasing regulatory powers over the foreign commerce and trade of the United States, and has in that connection become vested with the authority to make decisions which have considerable impact on American business firms. It has been recognized that many of these decisions, when finally made, are based on considerations of national security, and of the ultimate responsibility of the Executive Department for the conduct of foreign affairs, which may justify suspending or modifying some of the customary canons of correct administrative procedure. At the same time it is felt that opportunity for interested parties to present their points of view during the preparatory stages of State Department policy formulation might properly be expanded and, further, that greater accessibility to the public of information pertaining to departmental policies and procedures would be in order. The committee is currently therefore reviewing the adequacy of the existing notice, hearing and public information procedures employed by the State Department

and associated federal agencies in the field of foreign economic policy.

The adequate publicizing of such safeguards as already exist in the field of foreign economic regulation, and review of the feasibility of further administrative safeguards, may serve to meet the complaints of those who have been supporting the various Bricker amendments and similar proposals for transferring greater control over the conduct of international affairs from the executive to the legislative branch of our government. A large part of the interest in such proposals stems from the fact that American citizens respect the need for dispatch in executive affairs, but resent needless secrecy. The answer in the foreign economic field may lie, not in giving overworked legislators the added responsibility of deciding highly technical and complicated issues, but in making sure that the parties directly affected by an administrative decision have an adequate opportunity to present their views and circumstances prior to the decision and in publicizing the relevant procedures. The latter course need involve no fundamental reorganization of our governmental machinery. The Committee invites the bar to contribute its suggestions on the program.

Printing of Foreign Claims Settlement Commission Decisions. The Foreign Claims Settlement Commission has thus far published the principal decisions rendered by it in connection with the Panamanian, Yugoslavian and basic War Claims programs, which were completed in 1955. Funds are not available, however, to publish the principal decisions rendered since that time in connection with highly important Bulgarian, Hungarian, Italian, Rumanian and Soviet Claims programs. Mr. Andrew T. McGuire, General Counsel of the Commission, estimates that, out of 6,000 claims processed by the Commission during that time, only 100 involve decisions having precedent value. It does not seem right that the public and the bar should be deprived of ready access to agency decisions of such an important nature. The Committee therefore recommends that the Section endeavor, by statements to Congressional Committees and other means, formal or informal, to insure the publication of these decisions.

Preservation of Records of Foreign Service Notarial and Authentication Services. The views of this Section have been requested as to the period of time for which it is desirable to preserve the "Record of Fees" charged by foreign consulates of the United States for the notarial and authentication services per-

formed by American consular officers abroad. Such a record is required by 22 U.S.C. Sec. 1193, and a certified transcript of the record is required by 22 U.S.C. Sec. 1194 to be transmitted to the State Department. Approximately three years after the receipt of these records by the Department, they are transferred to the General Services Administration where, it is understood, they are stored for a period of approximately twelve years. The originals of its "Record of Fees" are generally retained by each Foreign Service post for a period of approximately five years. The legal authority for the retention and eventual disposition of these records is contained in 44 U.S.C., Chapters 10 and 11. The form used by the consulates is known as Foreign Service Form No. 101.

Pending receipt of suggestions from members of the bar who have had occasion to make use of these records in connection with matters of proof and the unearthing of evidence, the Committee is making no recommendation. It is requested that members of the bar with specific practical experience in this matter communicate their suggestions to the Chairman of the Committee.

SIGMUND TIMBERG, *Chairman*

MISCELLANY

1. Association actions on Section matters.

The Board of Governors at its May 19-20, 1958 meeting in Washington, D.C. took the following actions for the Association on Section recommendations:

a. Adopted the Section's proposed resolution on Immigration and Nationality matters:

> *Resolved,* That it is the opinion of the American Bar Association that the immigration and nationality laws of the United States be amended to consolidate into the Department of Justice or an independent agency of government the immigration and nationality responsibilities now vested by law separately in the Department of State and in the Attorney General, and
>
> That the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.
>
> 10 Ad. Law Bull. 68.

b. Transfer responsibility regarding a Congressional Committee on Administrative Practice and Procedure from the Section to the Special Committee on Legal Services and Procedure:

> *Resolved,* (1) That an additional ad hoc committee be authorized, which shall represent the Association in carrying out the resolution adopted by the House of Delegates on February 20, 1956, favoring the establishment within the Congress of the United States of a permanent committee on administrative procedure; (2) that it be known as the "Committee on Permanent Congressional Committee on Administrative Procedure"; and (3) That its chairman be a member of the Committee on Legal Services and Procedure."
>
> 10 Ad. Law Bull. 73.

c. Administrative Law Section briefing session, Fall Meeting:

> The Board granted the request that, in lieu of the meeting authorized to be held in the spring of 1958, a meeting of the Section of Administrative Law be authorized in the fall of 1958. In this connection, may I remind you that the date of the New England Regional Meeting, to be held in Portland, Maine, has been fixed for October 2-4, and that the Section Chairmen's Con-

ference will be held at the American Bar Center on Sunday, November 2, following the meeting of the Board of Governors at the Center on Friday and Saturday, October 31 and November 1.

II. Provisional Report in re proposals of Aviation Committee, 9 Ad. Law Bull. 204.

The Section, by authorization of the last Section meeting and recently by the Council, has distributed to the House of Delegates a Provisional Report proposing adoption of the following resolutions:

No. 1

WHEREAS, The American Bar Association by resolution of its House of Delegates, approved February 25, 1958, advocates adoption of a Code of Agency Tribunals Standards of Conduct comparable to the Canons of Judicial Ethics to govern administrative adjudications and enactment of appropriate legislation for this purpose;

Resolved, That the President of the Association is hereby authorized and directed to designate a Special Committee of the Association or at his election to authorize the Section of Administrative Law to draft a Code of Agency Tribunal Standards of Conduct and to draft and seek the enactment of necessary supporting legislation, and for these purposes to advise and consult with the Congress of the United States, the Executive Branch of the Government and administrative agencies in furtherance of the objective of eliminating ex parte influences or pressures from the trial and decision of agency cases.

No. 2

Resolved, That the American Bar Association is of the view that in Federal agency adjudicatory proceedings appearances at oral argument should be limited to the duly authorized and qualified representatives of the parties of record to the proceeding.

Resolved, That the Section of Administrative Law be authorized to urge the adoption of agency regulations or the enactment of legislation as may be effective and appropriate for this purpose.

No. 3

Resolved, That the American Bar Association supports the enactment of Section 1 of S. 1423, or successor legislation of similar import limiting Presidential review of decisions of the Civil Aeronautics Board, and,

Resolved, That the Section of Administrative Law be authorized to represent the Association in the furtherance of this resolution.

No. 4

Resolved, That the American Bar Association is of the view that decisions of the Civil Aeronautics Board which are subject to review by the President should be published and made available to the parties in the proceeding at the time of its submission to the President for review and decision.

No. 5

Resolved, That the American Bar Association supports the enactment of legislation which will provide for judicial review in accordance with the provisions of the Administrative Procedure Act of orders of the Civil Aeronautics Board entered by approval by the President under Section 801 of the Act in so far as such orders deny or violate procedure rights of the parties to such proceedings.

III. Post Office Department Library:

Section members who may have occasion to inquire into Post Office proceedings will be interested in the following communication, received from Herbert B. Warburton, Acting General Counsel:

> "We are in the process of establishing in our library an indexed file of Hearing Examiner's decisions, General Counsel's Departmental decisions, and subsequent court decisions, based on the Departmental decisions. We will have these decisions dating back to 1954 and, of course, will keep the file current as new ones are rendered. This file will be available to the members of the bar and the public, as well as the attorneys in our office."

IV. Sections' Ad Hoc Committee on Code of Agency Conduct.

A special committee was designated for the purpose of making a study and reporting to the annual meeting on a draft Code of Agency Conduct which might form the basis of a Section recommendation to the Association for implementation of the Atlanta resolution of February 25, 1958. The members of this special committee, who have accepted, are:

ALBERT E. STEPHAN, *Chairman*
JOHN B. GAGE, ESQ.
GUY FARMER, ESQ.
JUDGE DAVID W. PECK
MISS RUTH SMALLEY

The report of this committee will be considered at the Section's program, Monday afternoon, August 25, 1958.